Last page of docket
SHOW PROCEEDINGS AND ORDERS DATE: [02/28/89]

CASE NBR: [88106059] CSY STATUS: [ ]
SHORT TITLE: [Depew, Rhett G.]
VERSUS [Ohio] DATE DOCKETED: [120288]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Dec 2 1988		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jan 3 1989		Brief of respondent Ohio in opposition filed.
Jan 12 1989		DISTRIBUTED. February 17, 1989
Feb 21 1989		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

****

In The

Supreme Court of The United States

No. 88-6054

October Term, 1988

RHETT DEPEW,

PETITIONER,

-vs-

STATE OF OHIO,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RANDALL M. DANA
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QUESTIONS PRESENTED

I. Whether Extensive Prosecutorial Misconduct At The Sentencing Phase Of A Capital Trial Warrants A Reversal Of The Death Sentence, A Question Unanswered By This Court's Decision In Darden v. Wainwright, 477 U.S. 168 (1986).

II. Whether The Ohio Supreme Court Misapplied The Harmless Error Standard To The Prosecutorial Misconduct In The Sentencing Phase Of Petitioner's Capital Trial In Violation Of This Court's Decision In Satterwhite V. Texas, 486 U.S. ____, 100 L.E. 2d 284 (1988).

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In the

Supreme Court of The United States

No. _____

October Term, 1988

RHETT DEPEW,

PETITIONER,

-vs-

STATE OF OHIO,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Petitioner, Rhett DePew, prays that a writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in the above-entitled proceeding on August 31, 1988.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported as State v. DePew, 38 Ohio St. 3d 275 (1988) (Appendix A-6 - A-30). The opinion of the Court of Appeals, Twelfth Judicial District, is unreported and reprinted in the appendix. (Appendix A-35 - A-65.) The trial court opinion also appears in the appendix. (A-66 - A-72.)

JURISDICTIONAL STATEMENT

The Petioner's convictions and death sentences were affirmed by the Ohio Court of Appeals, Twelfth Judicial District. Petitioner appealed as a matter of right to the Ohio Supreme Court. (Ohio Constitution, Section (2)(B)(2)(a)(ii), Article IV). The Ohio Supreme Court affirmed the decision of the Court of Appeals on August 31, 1988. On September 8, 1988, Petitioner

filed a Motion For Rehearing. The Motion For Rehearing was denied by the Ohio Supreme Court on October 5, 1988.

The jurisdiction of this Court to review the judgment of the Ohio Supreme Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following Amendments to the United States Constitution:

A) The Fifth Amendment, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopary of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, libery, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B) The Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

C) The Eighth Amendment which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D) The Fourteenth Amendment, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, within the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Ohio statutes or rules that are implicated are reprinted in the appendix.

STATEMENT OF THE CASE

Petitioner DePew was indicted by the Butler County Grand Jury for the aggravated murders of Theresa Jones, Aubrey Jones and Elizabeth Burton. Each count of aggravated murder contained three death penalty specifications: the offense was committed while the offender was committing aggravated burglary, Ohio Rev. Code Ann. Section 2929.04(A)(7) (Page, 1988); the offense was committed while the offender was committing aggravated arson, Ohio Rev. Code Ann. Section 2929.04(A)(7) (Page, 1988), and the offense was part of a course of conduct involving the purposeful killing of two or more persons, Ohio Rev. Code Ann. Section 2929.04(A)(5) (Page, 1988).

Petitioner's jury trial began on June 17, 1985. At the conclusion of the guilt phase, the jury returned a verdict of guilty to the three counts of aggravated murder and the accompanying capital specifications.

The mitigation phase of Petitioner DePew's trial commenced on June 19, 1985. Petitioner presented twenty witnesses on his behalf at mitigation and his own unsworn statement. The state presented no witnesses in rebuttal at mitigation but engaged in a substantial amount of misconduct. The jury sentenced Petitioner DePew to death.

Petitioner appealed this decision to the Twelfth District Court of Appeals and the Ohio Supreme Court. Both courts affirmed the convictions and his death sentence.

PRESERVATION OF THE FEDERAL QUESTION

The error raised by the First Question Presented was raised to the Ohio Supreme Court as Proposition of Law Number Eleven. The Court addressed the merits of each instance of the prosecutorial misconduct in its opinion. The Ohio Supreme Court was also requested to reconsider its decision on the prosecutorial misconduct in a Motion For Rehearing.

The error raised by the Second Question Presented was raised to the Ohio Supreme Court as Proposition of Law Number Fourteen and in a Motion For Rehearing filed after the court's decision. In both documents, the issue was framed in terms of the reliability of the death determination where a capital trial is infected with a substantial number of errors.

The Fifth, Sixth, Eighth and Fourteenth Amendments were relied on for support as well as various provisions of the Ohio Constitution.

REASONS FOR GRANTING THE WRIT

I.

THE REPEATED OCCURRENCES OF PROSECUTORIAL MISCONDUCT AT THE MITIGATION PHASE OF PETITIONER'S CAPITAL TRIAL RESULTED IN AN UNRELIABLE DEATH DETERMINATION.

Throughout the mitigation phase of Petitioner DePew's capital trial, the State of Ohio engaged in numerous instances of prosecutorial misconduct. In its opinion in Petitioner's case, the Ohio Supreme Court recognized that the following actions by the State of Ohio constituted misconduct.

I. The first example arose when the State of Ohio conveyed to the jury that Petitioner DePew had been involved in a knife fight when in fact no fight took place. It occurred during the cross-examination of a defense witness who had characterized Petitioner DePew as a quiet, easy and outgoing person.

> Q. Did you ever see ... [Petitioner] carry a large knife in his jacket or anything?
>
> A. No.
>
> Q. You knew he got cut in a knife fight over at King Kwik, didn't you?
>
> A. Yes, I did.

Trial transcript, hereafter Tr. at 341. (A-87.)

A subsequent bench conference revealed that no "fight" had taken place; instead, Mr. DePew was the victim of the fight. Tr. 344-46.

Of this instance of prosecutorial misconduct the Ohio Supreme Court found that "the question by the prosecutor regarding the knife fight was improper." State v. DePew, 38 Ohio St. 3d 275, 284, 528 N.E. 2d 542 (1988).

II. Petitioner DePew's capital trial concerned three aggravated murders that occurred on November 23, 1984. Subsequent to November 23rd, Petitioner was arrested and convicted for the unrelated crime of receiving stolen property. At its mitigation closing in the capital trial, the State of Ohio argued the following.

> He wouldn't sit in that chair because then he would have to answer my questions. And then I would ask him if he has ever been convicted of a criminal offense after the date in question.

Tr. 578. (A-95.)

The Ohio Supreme Court recognized the impropriety of this argument. "The remark by the prosecutor was not proper impeachment of the credibility of appellant, who had made no statement relating to his criminal history subsequent to this offense (although in his unsworn statement appellant declared that he had no criminal record prior to this offense)." DePew, 38 Ohio St. 3d at 284.

III. Pursuant to Ohio Rev. Code Ann. Section 2929.03(D)(1) (Page, 1988), Petitioner exercised his right to make an unsworn statement at mitigation. The prosecutor, on two separate occasions, commented on Petitioner's failure to make a statement under oath. One of the two instances involved the quote set out above in Section II. The second comment occurred as follows:

> The other thing I thought in this case, you know, nothing in this case can be fun, and I don't mean for it to be that way. But the gentleman for the defendant, he told you five different times about the oath you took, and about the oath we all take, and the oath I take, and the oath you take - everybody takes the oath except the defendant; he isn't man enough to get up here and take the oath. Everybody in this case raised his right hand to this man, and he says I solemnly swear to tell the truth so help me God. Everybody except DePew.

Tr. 577-78. (Emphasis added.) (A-94 - A-95.)

In addressing this issue, the Ohio Supreme Court stated that "[t]o permit the prosecutor to extensively comment on the fact that the defendant's statement is unsworn affects Fifth Amendment rights and negates the defendant's statutory prerogative." DePew, 38 Ohio St. 3d at 285. The Ohio Supreme Court then continued on to define the parameters of prosecutorial comment on a defendant's unsworn statement. At the conclusion of its analysis, the Court stated that "the remarks made herein surely exceed the proper scope of comment set forth today...." Id.

IV. During the penalty phase, the State of Ohio introduced a photograph of Petitioner standing next to a marijuana plant. The prosecutor referred to this photograph in his closing argument.

> [S]o we thought we would show you a few things we thought were relevant - we thought were relevant, you know, to the last five years. There it says self and little brother, first year, (unclear) homegrown ten feet tall. Growing a little grass there you see.

Tr. 567. (A-89.)

The Ohio Supreme Court stated as follows:

"Admission of the marijuana photographs was error, since its probative value was nonexistent and its potential for prejudice was significant." DePew, 38 Ohio St. 3d at 287.

V. The State of Ohio, in its closing argument speculated about the possible sentences Petitioner could receive and his chances for parole.

> The defense says, and I knew they would, it doesn't make any difference what kind of penalty that you put on him because any sentence you give him is the death sentence. But that's not true. That's not true. Why, my goodness, Sirhan Sirhan is talking about getting out for killing Bobby Kennedy.

Tr. 572. (A-91.)

The prosecutor then continued:

> Well, if Your Honor please, he led them to believe that life means life, and it doesn't necessarily mean that, as the Court knows.
>
> * * *
>
> Now, you're going to have a lot of ... three options in this case, and you know what the three of them are. But what I'm telling you, when you hear, as the defendant told you, that twenty to life ... or life with eligibility in twenty means you're going to be there for life - that's not necessarily true.
>
> It's not necessarily true that if you get three counts of twenty to life that it will add up to sixty - that's not necessarily true. And that's the way the law is.

Tr. 572. (A-91.)

The Ohio Supreme Court inherently recognized these comments as "inappropriate or even universally condemned." DePew, 38 Ohio St. 3d at 287.

VI. During the mitigation phase closing argument, the prosecutor alluded to certain facts that were not in evidence. The prosecutor informed the jury that Petitioner's confession was not freely given, but given only after his girlfriend had turned him in to the police four months later. Tr. 566. (A-88.) No evidence existed in the trial record to support this statement.

Again, the Ohio Supreme Court implicitly recognized that this comment was "inappropriate or even universally condemned." Id.

VII. The prosecutor inquired of the jurors, at the penalty phase, why Petitioner did not present certain witnesses in his behalf at mitigation, most specifically, his common law wife. Tr. 576. (A-93.) The prosecutor also told the jurors that anyone, even Adolph Hitler, could bring someone in to testify as to his good character. Tr. 575. (A-92.)

These comments were inherently found by the Ohio Supreme Court to be "inappropriate or even universally condemned." Id.

VIII. Finally, the prosecutor made several remarks which appealed to "law and order". Tr. 570. (A-90.) Again, these comments were classified by the Ohio Supreme Court as "inappropriate or even universally condemned." Id.

In addressing all eight claims of misconduct the Ohio Supreme Court stated that "all these comments, taken together or even standing alone, constitute unreasonable and unfair conduct by the prosecutor...." Id. at 288. Although the Ohio Supreme Court reached this conclusion in each instance, it did not reverse Petitioner's death sentence; instead the Court relied either on the harmless error doctrine or this Court's decision in Darden v. Wainwright, 477 U.S. 168 (1986), to support affirmance of Petitioner's death sentence. The harmless error analysis will be discussed in detail in the Second Reason for Granting the Writ, infra.

In relying on Darden v. Wainwright, the Ohio Supreme Court explained that the "remarks by the prosecutor in Darden were clearly more inflammatory than those complained of herein." State v. DePew, 38 Ohio St. 3d at 288. The Ohio Supreme Court then went on to conclude that the "comments in the instant cause did not contaminate the proceedings to the point that Appellant's right to a fair trial was destroyed. ... The remarks in question did not render the penalty stage of Appellant's trial fundamentally unfair." Id.

The reliance on Darden v. Wainwright is totally misplaced. The prosecutorial misconduct in Darden arose in the guilt phase of the trial, not in the penalty phase. As this Court set forth in Darden, "[i]n this case, the

comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing." Darden v. Wainwright, 477 U.S. at 183, n.15.

By contrast, all the prosecutorial misconduct raised in Petitioner's case occurred at the sentencing phase. Its injection into the death determination process "rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case'". Caldwell v. Mississippi, 472 U.S. 320, 323 (1985) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). The comments made by the prosecutor in Petitioner's case allowed the jury to rest its death determination on impermissible and irrelevant factors. As a result, the Petitioner's death sentence should have been vacated; however, the Ohio Supreme Court refused to do so and affirmed the Petitioner's death sentence. Rather than reversing Petitioner's death sentence, the Ohio Supreme Court decided to fashion a new "remedy" for capital cases where prosecutorial misconduct has occurred. "In order to preserve the fairness of trial proceedings and to deter further misconduct, it is henceforth the intention of this Court to refer matters of misconduct to the Disciplinary Counsel in those cases where we find it necessary and proper to do so." State v. DePew, 38 Ohio St. 3d at 289.

This "remedy" is totally inappropriate for errors that have occurred due to prosecutorial misconduct. As this Court has recognized, prosecutorial misconduct involves a constitutional error. Darden v. Wainwright, 477 U.S. at 183, n.15. A constitutional error cannot be remedied by referring the case to a State's Disciplinary Counsel. As Justice Wright explained in his dissent in State v. DePew, 38 Ohio St. 3d at 299:

> I am troubled by the seeming departure from past case law that would compel reversal of the penalty phase of these proceedings and the suggestion that we should handle blatant prosecutorial misconduct through the Office of Disciplinary Counsel. I submit that this is cold comfort to the appellant who faces death by electrocution.

The only appropriate remedy is to reverse the conviction or death sentence.

Moreover, although the Ohio Supreme Court created this "remedy" to be applied prospectively, it has not referred one case to the Disciplinary Counsel.[1] More importantly, however, it failed to refer the prosecutor in Petitioner's case to the counsel.

The prosecutorial misconduct that occurred in Petitioner DePew's case was egregious and inappropriate. Each instance raised in this Petition was recognized by the Ohio Supreme Court as constituting misconduct yet the Ohio Supreme Court improperly relied on Darden v. Wainwright to affirm Petitioner's death sentence. This Court should grant certiorari to resolve the question not raised in Darden v. Wainwright of whether extensive prosecutorial misconduct at the sentencing phase of a capital trial warrants a reversal of Petitioner's death sentence.

II.

THE INTRODUCTION OF EIGHT SEPARATE INSTANCES OF PROSECUTORIAL MISCONDUCT AT THE PENALTY PHASE OF PETITIONER'S CAPITAL TRIAL DID NOT CONSTITUTE HARMLESS ERROR.

The penalty phase of Petitioner's capital trial was infected with eight separate instances of prosecutorial misconduct. The Ohio Supreme Court recognized the error of introducing this inflammatory material into Petitioner's trial; however, the court refused to reverse Petitioner's death sentence and instead relied on the harmless error doctrine. The application of harmless error in Petitioner's case was unwarranted and the standard applied by the Ohio Supreme Court did not comply with this Court's decision in Satterwhite v. Texas, 486 U.S. ____, 100 L.E. 2d 284 (1988).

In Satterwhite v. Texas, this Court set forth the harmless error standard to be applied in a capital case. This Court concluded "that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand." Id. at ____, 100 L.E. 2d at 293. Moreover, the "question, however,

[1] Since State v. DePew was announced by the Ohio Supreme Court, that court has considered four cases involving an issue concerning prosecutorial misconduct in which the Court did not reverse or refer the case to the Disciplinary Counsel: State v. Debra Brown, 38 Ohio St. 3d 305, 528 N.E. 2d 523 (1988); State v. Donald Williams, 38 Ohio St. 3d 346, 528 N.E. 2d 910 (1988); State v. Daniel Bedford, 39 Ohio St. 3d 122, 529 N.E. 2d 913 (1988), and; State v. Paul Greer, 39 Ohio St. 3d 236 (1988).

is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. at ____, 100 L.E. 2d at 295. (Quoting Chapman v. California, 386 U.S. 18, 24 (1967)). (Emphasis added.)

The Ohio Supreme Court failed to follow this test when it applied the harmless error doctrine in Petitioner's case to the occurrences of prosecutorial misconduct. The Ohio Supreme Court first stated that the "remarks by the prosecutor in Darden [v. Wainwright, 477 U.S. 168 (1986)] were clearly more inflammatory than those complained of herein. The comments in the instant cause did not contaminate the proceedings to the point that appellant's right to a fair trial was destroyed. The evidence supporting the sentence of death in this case was indeed overwhelming." State v. DePew, 38 Ohio St. 3d at 288. (Emphasis added.) At a later point in the Ohio Supreme Court's decision, the Court explained:

> While all these comments, taken together or even standing alone, constitute unreasonable and unfair conduct by the prosecutor, we must balance against that conduct the admission of appellant that he brutally stabbed to death a young mother, her daughter and her younger sister and then mutilated their bodies by fire. In cases such as this, we cannot ignore the compelling interest of the public, which has every right to expect its criminal justice system to work effectively.

Id.

Both quotes from the Ohio Supreme Court opinion underscore the fact that the Court did not engage in the analysis set forth in Satterwhite v. Texas. Instead the Court focused on the fact that overwhelming evidence supported Petitioner's death sentence, a fact this Court found irrelevant in Satterwhite, Petitioner's confession and the public interest in an effective justice system. At no point in its opinion did the Court hold that the State had proved beyond a reasonable doubt that the error complained of did not contribute to the verdict at the sentencing phase of Petitioner's trial.

The Ohio Supreme Court's entire analysis regarding the harmless error doctrine was flawed. Its concentration on the overwhelming evidence

supporting Petitioner's death sentence was irrelevant to a determination that the prosecutorial misconduct constituted harmless error. Even had the Ohio Supreme Court applied the correct standard from Satterwhite, however, the misconduct by the State did not constitute harmless error.

The prosecutorial misconduct in Petitioner's case involved introducing inflammatory and irrelevant evidence to the jury. Some of the evidence introduced was not even part of the record. The prosecutorial misconduct also implicated Petitioner's Fifth Amendment rights. Due to the substantial nature of the misconduct, it cannot be stated, beyond a reasonable doubt, that it did not contribute to the death verdict in Petitioner's case.

Moreover, although Petitioner was convicted of nine capital specifications, a wealth of mitigation was introduced at his behalf at the penalty phase. Petitioner presented twenty witnesses on his behalf at mitigation and his own unsworn statement. The Court of Appeals, in its opinion, recognized that the trial court considered the following mitigation:

> (1) The appellant was no problem to society prior to the offense and that he had not been convicted or arrested previously.
>
> (2) Appellant did favors for others and that he was helpful.
>
> (3) Appellant was unusually sensitive.
>
> (4) Appellant was good with children.
>
> (5) Appellant was a "good boy" as a child and had a normal childhood.
>
> (6) Appellant was a good husband.
>
> (7) Appellant was relatively youthful.
>
> (8) While he intended to burglarize the home he did not intend to kill anyone.

State v. Rhett DePew, Butler App. No. CA85-07-075 (June 29, 1987), p. 27 (A-63.) Based on this record, the misconduct committed by the State of Ohio did not constitute harmless error. Application of Satterwhite v. Texas, 486 U.S. ___, 100 L.E. 2d 284 (1988), emphasizes this point. The extensive nature of the prosecutorial misconduct prevents any conclusion, beyond a reasonable doubt, that it did not contribute to the death verdict in Petitioner's case.

This Court has consistently recognized that death is qualitatively different from a term of life imprisonment. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The combined effect of the prosecutorial misconduct at Petitioner's sentencing phase and an incorrect harmless error standard applied by the Ohio Supreme Court eradicated any reliability in Petitioner's death sentence.

The Ohio Supreme Court's failure to apply the standard in Satterwhite v. Texas warrants this Court's granting of certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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APPENDIX

The Supreme Court of Ohio

1988 TERM

To wit: October 5, 1988

State of Ohio, :
Appellee, : Case No. 87-1334

v. :

ENTRY

Rhett Gilbert DePew, :
Appellant. :

This cause came to be heard on appeal from the Court of Appeals for Butler County and was considered in a manner prescribed by law. On August 31, 1988, this Court affirmed the judgment of said Court of Appeals.

This cause now comes before the Court on the motion filed by appellant for reconsideration and to stay the issuance of the mandate herein. Upon consideration thereof,

IT IS ORDERED by the Court that the request for reconsideration be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that the request to stay the issuance of the mandate be, and the same is hereby, granted.

IT IS FURTHER ORDERED by the Court that the issuance of the mandate be, and the same is hereby, stayed pending the timely filing of an appeal to The Supreme Court of the United States.

IT IS FURTHER ORDERED that if such appeal is timely filed, this stay shall continue for an indefinite period pending the final disposition of this cause by The Supreme Court of the United States.

Thomas J. Moyer

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 5th day of October, 1988.

MARCIA J. MENGEL CLERK

Richard R. Hojais DEPUTY

PROPOSITIONS OF LAW RAISED IN THE OHIO SUPREME COURT

PROPOSITION OF LAW NO. I

THE RIGHT TO COUNSEL AND THE PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS PROHIBITS THE USE OF A DEFENDANT'S STATEMENT AS EVIDENCE AGAINST HIM IN THE ABSENCE OF A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF THOSE RIGHTS AS REQUIRED BY MIRANDA V. ARIZONA (1966), 384 U.S. 436. WAIVER MUST BE AFFIRMATIVELY DEMONSTRATED PRIOR TO INTERROGATION AND BEFORE ANY INTERROGATION FOLLOWING AN ASSERTION OF THE RIGHT TO SILENCE.

PROPOSITION OF LAW NO. II

APPELLANT'S CONFESSION WAS OBTAINED IN VIOLATION OF HIS RIGHT TO THE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. III

THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION PREVENT AN INVOLUNTARY CONFESSION FROM BEING INTRODUCED AGAINST THE ACCUSED. THE FAILURE OF THE TRIAL COURT TO SUPPRESS MR. DEPEW'S CONFESSION VIOLATED THESE CONSTITUTIONAL GUARANTEES.

PROPOSITION OF LAW NO. IV

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION; OHIO APPELLATE RULE 9(A); AND R.C. 2929.05 REQUIRE THE TRIAL COURT IN A CAPITAL CASE TO MAINTAIN A COMPLETE RECORD OF ALL PROCEEDINGS BY STENOGRAPHIC MEANS. ITS FAILURE TO MAINTAIN SUCH A RECORD IN MR. DEPEW'S CASE DENIED APPELLANT DEPEW HIS RIGHTS AS GUARANTEED BY THE UNITED STATES CONSTITUTION, THE OHIO CONSTITUTION AND THE OHIO REVISED CODE.

PROPOSITION OF LAW NO. V

OHIO REVISED CODE SECTION 2945.42 AND OHIO EVID. R. 601(B) PREVENT ONE SPOUSE FROM TESTIFYING AGAINST ANOTHER. ALLOWING THE COMMON-LAW WIFE OF APPELLANT TO TESTIFY AGAINST HIM VIOLATED OHIO LAW.

PROPOSITION OF LAW NO. VI

THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION AND SECTION 2945.25(C) OF THE OHIO REVISED CODE GUARANTEE AN ACCUSED A FAIR TRIAL AND IMPARTIAL JURY. THE TRIAL COURT'S EXCLUSION OF POTENTIAL JURORS HODGE, JORDAN, WENGER, AND PATTON DENIED APPELLANT THESE CONSTITUTIONAL GUARANTEES.

PROPOSITION OF LAW NO. VII

THE TRIAL COURT'S AND PROSECUTOR'S REPEATED COMMENTS TO THE JURY THAT THE JURY'S DEATH PENALTY VERDICT WAS ONLY A RECOMMENDATION AND NOT BINDING UPON THE TRIAL JUDGE VIOLATED APPELLANT'S RIGHT AGAINST THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT AND DUE PROCESS OF LAW IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. VIII

THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION GUARANTEE AN ACCUSED THE RIGHTS OF DUE PROCESS AND A FAIR AND IMPARTIAL TRIAL. ALLOWING GRUESOME, PREJUDICIAL AND CUMULATIVE PHOTOGRAPHS INTO EVIDENCE WHEN THE PREJUDICIAL EFFECT OF THESE PICTURES OUTWEIGHED THEIR PROBATIVE VALUE DENIED APPELLANT DEPEW THESE CONSTITUTIONAL GUARANTEES.

PROPOSITION OF LAW NO. IX

THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION GUARANTEE THE DEFENDANT A FAIR TRIAL FREE FROM PROSECUTORIAL MISCONDUCT. A PROSECUTOR WHO MAKES AN ON-THE-RECORD STATEMENT THAT HE DOES NOT INTEND TO BE FAIR VIOLATES SUCH RIGHTS.

PROPOSITION OF LAW NO. X

THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTIONS 9 AND 16 OF THE OHIO CONSTITUTION AND R.C. 2929.03 AND 2929.04 PROVIDE THAT ALL EVIDENCE RELEVANT TO A CAPITAL SENTENCING DETERMINATION BE ADMITTED AT MITIGATION. FAILURE TO ALLOW DEFENDANT TO ADMIT EVIDENCE ON THE FREQUENCY OF IMPOSITION OF THE DEATH SENTENCE IN SIMILAR CASES VIOLATES THESE CONSTITUTIONAL AND STATUTORY GUARANTEES.

PROPOSITION OF LAW NO. XI

THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION GUARANTEE TO THE ACCUSED THE RIGHTS TO A FAIR TRIAL AND TO NOT BE SUBJECT TO PROSECUTORIAL MISCONDUCT. THE PROSECUTOR'S INTRODUCTION OF A MATTER NOT SUPPORTED BY THE RECORD, A SUBSEQUENT CONVICTION BY APPELLANT ON AN UNRELATED CHARGE, AND AN INFLAMMATORY PHOTOGRAPH VIOLATED THESE CONSTITUTIONAL GUARANTEES.

PROPOSITION OF LAW NO. XII

THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTIONS 9, 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION, AND R.C. 2929.04 AND R.C. 2929.05 MANDATE A RELIABLE DEATH DETERMINATION IN A CAPITAL CASE. IN THE PENALTY PHASE OF CAPITAL TRIAL WHERE THE PROSECUTION ARGUES, AND THE COURT INSTRUCTS THE JURY AS TO MITIGATING FACTORS NOT PRESENTED BY THE DEFENDANT, THIS RELIABILITY IS ELIMINATED.

PROPOSITION OF LAW NO. XIII

THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE OHIO CONSTITUTION GUARANTEE THE ACCUSED A FAIR TRIAL AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT. THE TRIAL COURT'S INSTRUCTION IN THE MITIGATION PHASE PROHIBITING CONSIDERATION OF MERCY AND SYMPATHY VIOLATED SUCH RIGHTS.

PROPOSITION OF LAW NO. XIV

THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTIONS 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION AND R.C. 2929.05 PROVIDE THAT ANY DEATH SENTENCE IMPOSED IN A CAPITAL CASE MUST BE RELIABLE AND APPROPRIATE. WHEN THE GUILT AND MITIGATION PHASES OF THE CAPITAL TRIAL ARE REPLETE WITH ERRORS, INCLUDING AN ERRONEOUS MITIGATION WEIGHING PROCESS, THE DEATH SENTENCE VIOLATES THESE CONSTITUTIONAL AND STATUTORY REQUIREMENTS.

PROPOSITION OF LAW NO. XV

THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION AND OHIO REVISED CODE SECTION 2929.05 GUARANTEE A CONVICTED DEFENDANT A FAIR AND IMPARTIAL REVIEW OF HIS DEATH SENTENCE. THE STATUTORILY MANDATED PROPORTIONALITY PROCESS IN OHIO IS FATALLY FLAWED THEREBY DENYING APPELLANT THE ABOUT RIGHTS.

PROPOSITION OF LAW NO. XVI

THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 2, 9, 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION ESTABLISH THE REQUIREMENTS FOR A VALID DEATH PENALTY SCHEME. OHIO REVISED CODE SECTIONS 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 AND 2929.05, OHIO'S STATUTORY PROVISIONS GOVERNING THE IMPOSITION OF THE DEATH PENALTY, DO NOT MEET THE PRESCRIBED REQUIREMENTS, AND, THUS, ARE UNCONSTITUTIONAL BOTH ON THEIR FACE AND AS APPLIED TO APPELLANT DEPEW.

THE STATE OF OHIO, APPELLEE, v. DEPEW, APPELLANT.

[Cite as State v. DePew (1988), 38 Ohio St. 3d 275.]

Criminal law—Aggravated murder—Death penalty upheld, when—Penalty stage of capital trial—Prosecutor's right to introduce relevant evidence—Right to comment on defendant's unsworn statement, limited—Right to rebut statements re defendant's criminal record, limited—Referral for disciplinary action of misbehaving counsel.

O.Jur 3d Criminal Law §§ 1841, 1845.

1. Pursuant to R.C. 2929.03(D)(1), the prosecutor, at the penalty stage of a capital trial, may introduce "* * * any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing * * *."
2. Where the defendant chooses to make an unsworn statement in the penalty stage of a capital trial, the prosecution may comment that the defendant's statement has not been made under oath or affirmation, but such comment must be limited to reminding the jury that the defendant's statement was not made under oath, in contrast to the testimony of all other witnesses. (*State* v. *Mapes* [1985], 19 Ohio St. 3d 108, 19 OBR 318, 484 N.E. 2d 140, modified in part.)
3. The prosecutor, in the penalty stage of a capital trial, may rebut false or incomplete statements regarding the defendant's criminal record. This right is limited, however, to those instances where the defense offers a specific assertion, by a mitigation witness or by the defendant, that misrepresents the defendant's prior criminal history.

(No. 87-1334—Submitted June 14, 1988—Decided August 31, 1988.)

APPEAL from the Court of Appeals for Butler County, No. CA85-07-075.

Late in the evening of November 23, 1984, Tony Jones returned from work to find his home in flames. In the course of battling the blaze, firefighters discovered three bodies inside the house. They were subsequently identified as those of Tony Jones' wife, Theresa, age twenty-seven, their daughter, Aubrey, seven, and Theresa's sister, Elizabeth Burton, twelve. Autopsies revealed that Theresa had died from at least fourteen stab wounds, that Aubrey had perished as the result of twenty-one stab wounds, and that Elizabeth had died from a combination of five stab wounds, burns and carbon monoxide poisoning.

On April 3, 1985, Detective Sergeant Rick Sizemore questioned Deborah Sowers about the homicides. During the course of the interview, Sowers implicated defendant-appellant, Rhett DePew. Based on this information, Sizemore and Detective Joe Rooks located appellant and arrested him on an outstanding, unrelated warrant. Appellant was taken to the prosecuting attorney's office in Hamilton, where he was questioned for several hours about the murders. Appellant eventually confessed to the crimes, giving the following account.

On the evening of the murders, appellant and his girlfriend, Deborah Sowers, drove to the Joneses' resi-

dence to "get some money." Appellant was armed with a large knife. Once he believed the house to be empty, he approached it alone, entered through a back door, and began searching the house. As he approached a bedroom, he was confronted by the victims, who began screaming. He "freaked out" and "just started swinging" with his knife, stabbing the three repeatedly. He then set fire to some clothing in Theresa's closet. Before leaving, he discovered a baby crying in a back bedroom. He wrapped the child in a blanket and left her on the porch of the house next door. Sowers then picked appellant up and they went home.

Appellant was indicted on three counts of aggravated murder in violation of R.C. 2903.01(B). Each murder count contained the following death penalty specifications: the offense was committed while the offender was committing aggravated burglary (R.C. 2929.04[A][7]), the offense was committed while the offender was committing aggravated arson (R.C. 2929.04 [A][7]), and the offense was part of a course of conduct involving the purposeful killing of two or more persons (R.C. 2929.04[A][5]). Appellant pleaded not guilty to all counts.

Before trial, appellant moved to suppress his confession. He also filed a motion in *limine* to prevent Sowers from testifying against him on the basis that she was his common-law wife. These motions, after a hearing, were denied.

Jury trial commenced on June 17, 1985. Appellant offered no evidence. The jury returned a verdict of guilty on all counts and on the accompanying specifications.

During the penalty phase, appellant presented twenty witnesses and his own unsworn statement. The jury found that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt, and recommended a sentence of death. The trial court, upon making its own required independent determination, adopted the recommendation and imposed a penalty of death.

The court of appeals affirmed.

The cause is now before this court upon an appeal as of right.

John F. Holcomb, prosecuting attorney, and *Daniel G. Eichel*, for appellee.

Randall M. Dana, public defender, *Randall L. Porter*, *Joann Bour-Stokes*, *Scott Jelen* and *John A. Garretson*, for appellant.

DOUGLAS, J. The instant case presents this court with numerous issues for our review and determination. For the reasons that follow, we uphold appellant's convictions and affirm the sentence of death.

In Propositions of Law I, II and III, appellant challenges the admission of his confession into evidence on the grounds that the confession was not voluntarily given, that he was denied his right to counsel, and that he had not waived his rights under *Miranda* v. *Arizona* (1966), 384 U.S. 436, 10 Ohio Misc. 9, 36 O.O. 2d 237.

In his argument on the issue of voluntariness, appellant recites the following sequence of events. He was arrested around 5:00 p.m. on April 3, 1985. Interrogation commenced at about 6:00 p.m., resulting in a confession beginning at approximately 12:45 a.m. and ending at 1:30 a.m. At 5:50 a.m., appellant signed a transcript of his oral statement. Appellant was isolated at the county prosecutor's office where those trying to assist him could not locate him. As a result of the prolonged interrogation, appellant claims he was deprived of food and sleep. Appellant further claims he was threatened that if he did not confess, his girlfriend, Sowers, would go to prison, where "they do terrible things to young pretty girls." All these factors, appellant argues, combined to render his confession involuntary and inadmissible.

The trial court found that appellant confessed voluntarily, after he was orally advised of his *Miranda* rights. Specifically, the court found that the isolation of appellant had no unconstitutional coercive effect; that appellant's confession, as reflected in the tape recording thereof, was "casual" and "unemotional"; that appellant was told twice on the tape recording that he did not have to talk if he did not want to; that appellant sounded alert and in control on the tape, and appeared to the interrogator to be alert at the time of questioning; that appellant received food and drink during the interview; that he availed himself of restroom facilities and other accommodations; that while his confession was being typed, appellant watched television; that appellant was a thirty-one-year-old man with a high school education and possessing normal intelligence; that appellant was no novice to the criminal justice system; and that appellant had voluntarily made statements to Detective Sizemore on a prior occasion.

"In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State* v. *Edwards* (1976), 49 Ohio St. 2d 31, 3 O.O. 3d 18, 358 N.E. 2d 1051, paragraph two of the syllabus.

Clearly, the trial court was careful to consider the totality of the circumstances in its determination that appellant's confession was voluntarily given. Appellant's testimony concerning the details surrounding his confession differed substantially from the testimony of other witnesses. The record contains ample evidence supporting the factual findings by the trial court. Appellant's testimony to the contrary was obviously not believed. In reviewing a ruling on a motion to suppress, an appellate court must bear in mind that the weight of the evidence and the credibility of witnesses are for the trier of fact. *State* v. *Fanning* (1982), 1 Ohio St. 3d 19, 20, 1 OBR 57, 58, 437 N.E. 2d 583, 584. Thus, the trial court's ruling that appellant confessed voluntarily will not be disturbed.

The same conclusion must be drawn with respect to appellant's contentions that he was never advised of his *Miranda* rights and that he repeatedly, to no avail, requested a lawyer. Appellant and other witnesses testified that at the time of appellant's arrest, he told the arresting officer that he would not talk to him without a lawyer. The trial court did not accept this testimony, finding that appellant never communicated a request for a lawyer to any law enforcement officer on the day of his confession, and that if such a request was ever made, it was directed to appellant's relatives at the scene of the arrest, and the officers were not aware of the request. These findings are clearly supported by the evidence adduced at the suppression hearing.

The fact that appellant's relatives and the attorney they had contacted could not determine appellant's whereabouts after his arrest is irrelevant to the admissibility of appellant's confession. The dispositive issue is whether appellant's statement was voluntarily given with knowledge of his right to remain silent and to have an attorney

present. "The determinative factor in these cases is the *desire of the accused to consult with counsel, not the desire of counsel to consult with the accused.*" (Emphasis sic.) *State* v. *Carder* (1966), 9 Ohio St. 2d 1, 7, 38 O.O. 2d 1, 4, 222 N.E. 2d 620, 625. Events occurring without the knowledge of the suspect can have no bearing on his capacity to understand and knowingly relinquish a constitutional right. *Moran* v. *Burbine* (1986), 475 U.S. 412, 422. The trial court specifically found that the inability of appellant's relatives to locate him was not the result of misleading or misrepresentation by jail personnel.

Appellant next argues that his right to counsel attached at the moment of his arrest, and that any interrogation was improper after the arrest, since appellant claims to have requested a lawyer at that time. *Edwards* v. *Arizona* (1981), 451 U.S. 477. However, as noted above, the trial court found that no such request was communicated to the officers at the time of the arrest. Moreover, the right to counsel has consistently been viewed as attaching at trial, and at "critical" stages of the proceedings before trial where " 'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or both.' " *United States* v. *Gouveia* (1984), 467 U.S. 180, 189, citing *United States* v. *Ash* (1973), 413 U.S. 300, 310. The time of appellant's arrest cannot possibly be described as a "critical" stage involving any such confrontation. All the evidence at the suppression hearing, including appellant's own testimony, established that there was no interrogation of appellant either at the time of the arrest or in the car on the way to the prosecutor's office. Mere arrest and transportation does not constitute a "confrontation" similar to a trial. Appellant's confession was properly admitted into evidence.

In Proposition of Law IV, appellant contends that the trial court erred to his prejudice by failing to require the recording of the proceedings by stenography.[1] Instead, the entire trial was tape recorded and later transcribed. Appellant asserts that since the record contains two hundred sixty-one instances of words or phrases marked "inaudible," "no audible response," or "unclear," he has been deprived of the complete record to which he is entitled for an effective appeal.

Appellant's contention that, as a defendant in a capital case, he is constitutionally entitled to a "complete, full, and unabridged transcript" is correct. *State, ex rel. Spirko,* v. *Court of Appeals* (1986), 27 Ohio St. 3d 13, 18, 27 OBR 432, 436, 501 N.E. 2d 625, 629. However, the capital defendant in

[1] None of the rules governing procedure in the trial courts mandates that trials, even capital trials, be recorded by stenography. Crim. R. 22 requires only that "[i]n serious offense cases all proceedings shall be recorded. * * * Proceedings may be recorded in shorthand, or stenotype, or by any other adequate mechanical, electronic or video recording device."

See, also, C.P. Sup. R. 10 (proceedings may be recorded by stenography or by the use of audio recording devices). However, App. R. 9(A) provides in pertinent part that "[i]n all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means." Where, as here, there is a conflict between the Appellate Rules and the rules governing procedure in the common pleas courts, the procedural rule for the trial court will prevail where the conflict relates to trial court procedure. Nevertheless, we consider recordation by stenography to be the far better approach in capital trials.

Spirko had been denied access to entire transcripts of hearings, such as the arraignment and hearings on motions. *Id.* at 14, 27 OBR at 433, 501 N.E. 2d at 626. Here, appellant was provided with a complete transcript of all the proceedings, which contains occasional lapses due to inaudibility. To hold that appellant has therefore been denied his right to a complete transcript would be highly unjustified unless appellant has clearly demonstrated prejudice resulting from the missing portions.

Appellant does not point out a specific instance where effective review is precluded by incompleteness of the transcript. Appellant makes only general averments that the missing information "could be vital" to his arguments. Moreover, appellant took no steps to correct the record, as he could have under App. R. 9(E),[2] by submitting to the trial court any changes he believed would better preserve his arguments for review. *State* v. *Osborne* (1976), 49 Ohio St. 2d 135, 142, 3 O.O. 3d 79, 82-83, 359 N.E. 2d 78, 84. Given the fact that appellant has not demonstrated that he was prejudiced by the alleged inadequacy of the record, this proposition of law is rejected.

In Proposition of Law V, appellant asserts that the trial court erred in overruling his motion in limine, filed before trial, to prevent the prosecution from calling Deborah Sowers. In that motion, appellant contended that Sowers was his common-law wife and that her testimony was therefore subject to the spousal privilege contained in Evid. R. 601(B).

A common-law marriage is established when the following elements are shown: (1) an agreement of marriage in presenti; (2) cohabitation as husband and wife; and (3) a holding out by the parties to those with whom they normally come into contact, resulting in a reputation as a married couple in the community. *Nestor* v. *Nestor* (1984), 15 Ohio St. 3d 143, 15 OBR 291, 472 N.E. 2d 1091. All these elements must be demonstrated by clear and convincing evidence. *Id.* at 146, 15 OBR at 293, 472 N.E. 2d at 1094.

A review of the record reveals numerous inconsistencies on the issue of whether the parties really considered themselves married. While they filed joint tax returns for two years and signed leases as "Rhett and Debbie DePew," on almost every other documented occasion, they represented themselves as single. For example, Deborah's three workers' compensation forms, filled out by her, reflect a single status. In his confession, appellant refers to Deborah as his "girlfriend." In filling out hospital forms in December 1984, appellant and Deborah marked "single" for marital status. Appellant admitted telling law enforcement officers on several occasions that he was single. Deborah told Sizemore that appellant was her "boyfriend." In short, the evidence is de-

[2] App. R. 9(E) provides:

"Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own motion, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals."

cidedly conflicting. Under no circumstances did appellant establish a common-law marriage by clear and convincing evidence. The motion in *limine* was properly overruled.

In Proposition of Law VI, appellant contends that the trial court erred in excluding certain prospective jurors because of their views as to the death penalty.

"The proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. * * *" (Citation omitted.) *State* v. *Rogers* (1985), 17 Ohio St. 3d 174, 17 OBR 414, 478 N.E. 2d 984, paragraph three of the syllabus, vacated and remanded on other grounds (1985), 474 U.S. 1002. Appellant contends that the jurors were improperly excused since they never unequivocally stated that they could not follow the judge's instructions under any circumstances. However, this is not the standard. The prospective juror, to be properly excused, need only make it known that his views would "prevent *or substantially impair*" the performance of his duties. (Emphasis added.) *Id.* A review of the record reveals that the four prospective jurors in question each demonstrated an inability to consider death as a sentencing option. Each of the four made it sufficiently clear that his or her personal views of capital punishment would, at the very least, substantially impair his or her ability to recommend death. The determination of juror bias necessarily involves a judgment on credibility, the basis of which often will not be apparent from an appellate record. *Wainwright* v. *Witt* (1985), 469 U.S. 412, 429. For this reason, "* * * deference must be paid to the trial judge who sees and hears the juror." *Id.* at 426. The trial court's decision to exclude these four jurors is supported in the record. That ruling will not be disturbed.

Appellant argues in Proposition of Law VII that the trial court erred in commenting to the jury that any recommendation of death by the jury would be only a recommendation which would not be binding on the court. Appellant's statement that the trial judge *and* the prosecutor repeatedly informed the jury that its death penalty recommendation was "merely" a recommendation is inaccurate. The prosecution never made any such comment, and the trial judge so commented only *once*.

Appellant cites *Caldwell* v. *Mississippi* (1985), 472 U.S. 320, in support of his contention that the judge's comment was reversible error. This precise argument has been repeatedly rejected by this court on previous occasions. See, *e.g.*, *State* v. *Buell* (1986), 22 Ohio St. 3d 124, 144, 22 OBR 203, 220, 489 N.E. 2d 795, 812-813; *State* v. *Williams* (1986), 22 Ohio St. 3d 16, 21-22, 23 OBR 13, 18-19, 490 N.E. 2d 906, 912; *State* v. *Steffen* (1987), 31 Ohio St. 3d 111, 113-114, 31 OBR 273, 275, 509 N.E. 2d 383, 387-388. See, also, *Darden* v. *Wainwright* (1986), 477 U.S. 168, 183, at fn. 15. No compelling arguments are presented by appellant which would warrant a shift in this position.

In Proposition of Law VIII, appellant contends the trial court erred in allowing *gruesome*, prejudicial and cumulative photographs to be admitted into evidence. Approximately seventy photographs were admitted at trial. Of these seventy, only eleven showed the bodies of the victims. Of these eleven, six were autopsy photographs, enlarged to poster size, showing front and rear views of each of the three victims.

Appellant does not focus his attention on the six autopsy photographs. Rather, appellant's argument deals almost exclusively with the sixty-four photographs of the crime scene, which appellant contends were not only repetitive, but "gruesome" as well. In regard to the photographs' not depicting bodies, appellant submits that "their content was just as horrifying and contained the same shock value as the presence of a body in the picture." As examples, appellant points to photos depicting blood-stained areas, or portions of carpet which had escaped burn damage from the fire because a body had been lying there.

We do not agree with this analysis. The photos of blood stains or fire damage to property do not have a shock value equivalent to the photograph of a corpse. The term "gruesome" in the context of photographic evidence should, in most cases, be limited to depictions of actual bodies or body parts.

As to the repetitive or cumulative nature of the sixty-four photographs, it is difficult to see how appellant could have been prejudiced by these photographs of the crime scene. "To be admissible in a capital case, the probative value of each photograph must outweigh the danger of prejudice to the defendant and, additionally, not be repetitive or cumulative in nature." *State* v. *Morales* (1987), 32 Ohio St. 3d 252, 258, 513 N.E. 2d 267, 274. In *State* v. *Thompson* (1987), 33 Ohio St. 3d 1, 9, 514 N.E. 2d 407, 416, this standard was described as the "test for admitting *gruesome* photographic evidence * * *." (Emphasis added.) While it is true that the sheer number of photographs admitted may constitute error where they are needlessly cumulative, Evid. R. 403(B), the mere fact that there are numerous photos will not be considered reversible error unless the defendant is prejudiced thereby. Absent gruesomeness or shock value, it is difficult to imagine how the sheer number of photographs admitted can result in prejudice requiring reversal. In the instant case, prejudice has clearly not been demonstrated. The overwhelming majority of photographs depict the crime scene without bodies or blood. The probative value of these photos lies in their relevance to the origin of the fire and the extent of fire damage, which would explain why no fingerprints or other physical evidence implicating appellant was recovered from the scene. As to the five photographs which contain views of a body, only two show a body in the foreground, while the other three show the body or small portions of the body. These photographs have clear probative value as they are relevant to the cause of death and are illustrative of testimony of state witnesses concerning the crime scene and the elements of the offenses charged. These photographs were kept to a minimum and their admission did not result in reversible error. We conclude that the probative value of the photographs outweighed the danger of prejudice to appellant, and that their admission into evidence was not an abuse of the trial court's discretion. *Morales*, *supra*, at 258, 513 N.E. 2d at 274; *State* v. *Maurer* (1984), 15 Ohio St. 3d 239, 265, 15 OBR 379, 401, 473 N.E. 2d 768, 791-792.

As to the six autopsy photographs, their content is indeed gruesome. "However, the mere fact that a photograph is gruesome or horrendous is not sufficient to render it *per se* inadmissible." *Maurer*, *supra*, at 265, 15 OBR at 401, 473 N.E. 2d at 791. Their probative value must outweigh the danger of prejudice, and they must not be repetitive or cumulative. The probative value of these photos is beyond dispute, as they are manifestly relevant to show cause of death and the killer's purpose

to cause death. *Id.* See, also, *State* v. *Martin* (1985), 19 Ohio St. 3d 122, 129, 19 OBR 330, 336, 483 N.E. 2d 1157, 1164. Again, the number of photographs was kept to an absolute minimum: two photos of each victim, showing a front and a rear view. Their probative value was substantial, while the danger of unfair prejudice, though present, was relatively limited. The enlargement of these autopsy photographs to poster size does not necessarily tip the scale toward automatic reversal. The photographs were enlarged to illustrate the testimony of the coroner, who was seated some distance from the jury. The enlargements were, therefore, not inappropriate and there is no indication that the enlargements were intended solely to inflame the jury's passions against appellant.

Lastly, appellant argues that the trial court erred in submitting all these photographs to the jury *in the penalty phase*. In his instructions at this stage, the trial judge stated that "[t]he Court is going to place in your possession the exhibits which the Court admitted into evidence during the course of both trials * * *." Citing *Thompson*, *supra*, appellant argues that these photographs were relevant to guilt, not to the appropriate penalty, and that permitting the jury to view the photographs again served no purpose but to inflame their passions against appellant.

Our decision in *Thompson* is being misconstrued, we assume unintentionally, as holding that the introduction of gruesome photographs in the penalty stage is reversible error. It is not. *Thompson* was meant principally to focus on the question of prosecutorial misconduct, especially the issue of commenting on a defendant's silence at any stage of the proceedings. In fact, we find that the introduction of photographs, even if gruesome, in the penalty stage is not error and is indeed authorized by R.C. 2929.03(D)(1), which provides in part that during the penalty stage, the court and the trial jury *shall* consider "* * * any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing * * *." In addition, this section provides that the court and the trial jury "* * * shall hear testimony and other evidence that is relevant to *the nature and circumstances* of the aggravating circumstances the offender was found guilty of committing * * *." (Emphasis added.)

We determine that these provisions do not preclude the introduction of photographs which are relevant to the nature and circumstances of the aggravating circumstances, and in fact authorize such introduction. Further, if additional support is needed, R.C. 2929.03(D)(1) also provides that the court and the trial jury "* * * shall hear * * * the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender.* * *" Where photographs, including gruesome photographs, relating to the nature and circumstances of the aggravating factors are not admitted in the penalty stage, a question could arise as to whether, in this second part of a bifurcated trial, it would be proper for a prosecutor to comment on such photographs.

The courts of this state have been required to wrestle with the question of what evidence is appropriate for the prosecution to introduce at the penalty stage. We now hold that, pursuant to R.C. 2929.03(D)(1), the prosecutor, at the penalty stage of a capital proceeding, may introduce "* * * any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing * * *." While this appears to permit

repetition of much or all that occurred during the guilt stage, nevertheless, a literal reading of the statute given to us by the General Assembly mandates such a result, especially in light of the prosecution's obligation to demonstrate, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation. R.C. 2929.03(D)(1).

In Proposition of Law IX, appellant contends that he was deprived of a fair trial by a remark made by the prosecutor during the pretrial hearing on Sowers' competency to testify. The dialogue in question is as follows:

"BY THE COURT: Would that be fair to the defendant in this case?

"MR. SAGE: Well I don't care what's fair to the defendant, Your Honor."

Appellant's argument is devoid of merit. The statement was obviously intemperate and seriously ill-advised, but its prejudicial effect was surely minimal. The jury was not present at this stage of the proceeding. The remark was made to the trial judge, who responded to the prosecutor's statement that "I don't care what's fair" by saying, "Well, the Court has to consider that * * *." Obviously, the court was aware of its obligation to be fair, and it should not be presumed that this single, ill-considered comment would prejudice the judge against appellant. Appellant has failed to demonstrate that this isolated remark so tainted the proceedings that appellant was deprived of a fair trial. *Steffen*, *supra*, at 116, 31 OBR at 277-278, 509 N.E. 2d at 389.

Appellant next argues, in Proposition of Law X, that the trial court erred in refusing to admit certain statistical evidence in the penalty stage of the trial. The evidence proffered by appellant comprised statistics regarding the number of defendants in Ohio who were charged with aggravated murder with a specification under R.C. 2929.04(A)(5) (purposeful killing of two or more persons), and the proportion of such defendants who actually received the death penalty. The trial court ruled that these statistics were irrelevant.

While it is true that the defendant in a capital case must be afforded wide latitude in presenting evidence in mitigation, R.C. 2929.03(D)(1), and it can reasonably be argued that the evidence should have been admitted pursuant to R.C. 2929.04(B)(7),[1] these requirements do not limit the authority of a court to exclude, as irrelevant, any evidence which has no bearing on the defendant's character, prior record, or the circumstances of the offense. *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, 189, 15 OBR 311, 333, 473 N.E. 2d 264, 289. The statistics proffered by appellant would have offered no insight whatsoever into appellant's character, his prior record, or the circumstances of his offense, but may have been relevant to whether appellant should have been sentenced to death. Here, the trial court found that such evidence would not have assisted the jury in making an individualized determination of whether the death penalty was appropriate in this particular case. We will not disturb the trial court's judgment in this regard.

In Proposition of Law XI, appellant contends that he was denied a fair trial by various instances of prosecutorial misconduct during the penalty stage.

[1] R.C. 2929.04(B)(7) permits the defendant to present "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death."

The first such instance occurred when the prosecution was cross-examining a defense witness, who had described appellant as "quiet, easy, outgoing." The following took place:

"Q. Did you ever see * * * [appellant] carry a large knife in his jacket or anything?

"A. No.

"Q. You knew he got cut in a knife fight over at King Kwik, didn't you?

"A. Yes, I did."

The trial court sustained defense counsel's objection to this question and offered the following curative instruction: "Ladies and gentlemen, with regard to the question and answer on the knife fight, we will strike that from the record, and the jury must reach its deliberations as if that was never presented before you and it is at this time inadmissible. Alright, you may proceed."

The misconduct of a prosecuting attorney during trial is not reversible error unless it deprives the defendant of a fair trial. *Maurer*, *supra*, at 266, 15 OBR at 402, 473 N.E. 2d at 793. Although the question by the prosecutor regarding the "knife fight" was improper, it was not so egregious as to require reversal. First, the question's intimation of wrongdoing by appellant was only indirect, *i.e.*, that appellant "got cut" (by someone else) in a fight involving a knife. Second, the question did have some relevance to the witness' credibility on the issue of appellant's character as peaceful. Third, the trial court promptly admonished the jury to disregard the question and the answer and to deliberate as if the question had never been asked. Generally, a reviewing court must presume that the jury followed the trial court's curative instruction. *State* v. *Ferguson* (1983), 5 Ohio St. 3d 160, 163, 5 OBR 380, 383, 450 N.E. 2d 265, 269.

Appellant also objects to a comment, made by the prosecutor during final argument in the penalty stage, in which the prosecutor stated that if appellant had taken the stand, the prosecutor would have asked him "if he's ever been convicted of a criminal offense after the date in question in this case." Defense counsel immediately objected, the jury was instructed to disregard the comment, and the defense moved for a mistrial on the basis of the reference to a subsequent conviction. This motion was overruled. Before resuming his final argument, the prosecutor apologized to the court for his comment, and stated that "I would tell the jury to disregard it; I shouldn't have said that. I wish you would just forget that because there's nothing like that here."

The remark by the prosecutor was not proper impeachment of the credibility of appellant, who had made no statement relating to his criminal history subsequent to this offense (although in his unsworn statement appellant declared that he had no criminal record *prior* to this offense). However, the prejudicial effect of the prosecutor's remark was greatly minimized not only by the curative instruction, but also by the prosecutor's apology to the jury, and by his assurance to the jury that they should forget his remark "because there's nothing like that here." By this statement, the jury was told by the prosecutor himself that no subsequent conviction had occurred. Thus, his prior comment was not so prejudicial as to require reversal. See *State* v. *Apanovitch* (1987), 33 Ohio St. 3d 19, 24, 514 N.E. 2d 394, 400.

Although appellant herein does not focus on the prosecutor's remarks regarding appellant's failure to make a

sworn statement,[4] we deem it appropriate at this juncture to examine the general propriety of such remarks. R.C. 2929.03(D)(1) provides in pertinent part that "[i]f the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation." This section grants the defendant in a capital proceeding the right to make an unsworn statement at the penalty stage. To permit the prosecutor to extensively comment on the fact that the defendant's statement is unsworn affects Fifth Amendment rights and negates the defendant's statutory prerogative. However, to totally restrict the prosecutor from making *any* comment would likewise be unfair, especially where the defendant, in his unsworn statement, has offered something less than "the truth, the whole truth and nothing but the truth." Therefore, notwithstanding our previous pronouncements in *State* v. *Mapes* (1985), 19 Ohio St. 3d 108, 116, 19 OBR 318, 324-325, 484 N.E. 2d 140, 147, we now hold that where the defendant chooses to make an unsworn statement in the penalty stage of a capital trial, the prosecution may comment that the defendant's statement has not been made under oath or affirmation, but such comment must be limited to reminding the jury that the defendant's statement was not made under oath, in contrast to the testimony of all other witnesses. While the remarks made herein surely exceed the proper scope of comment set forth today, we find that such remarks are harmless error in light of the overwhelming weight of the aggravating circumstances in this case relative to the factors offered in mitigation, as discussed *infra*.

The foregoing analysis, however, leaves unanswered the question of what may be presented by the prosecutor to rebut the untruthful comments of a defendant in his unsworn statement or, for that matter, testimony of defense mitigation witnesses which is untruthful.[5] For an answer to this problem, which has perplexed various courts, including this court, in past cases, we again turn to R.C. 2929.03(D)(1). That statute provides in pertinent part that "[t]he prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death." We believe that the prosecutor, in order to effectively discharge this burden, must be empowered to rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false.

We find further support for this

[4] The pertinent remarks, which occurred during the prosecutor's closing argument during the penalty stage, were as follows:

"[T]he gentleman for the defendant, he told you five different times about the oath you took, and about the oath we all take, and the oath I take, and the oath you take—everybody takes the oath except the defendant, he isn't man enough to get up here and take the oath. Everybody in this case took the oath. Everybody in the case raised his right hand to this man, and he says I solemnly swear to tell the truth, the whole truth and nothing but the truth so help me God. Everybody except DePew * * *."

[5] By this expression, we do not intend to suggest any belief that appellant herein or any of the defense witnesses presented untruthful statements during this proceeding

conclusion in R.C. 2929.03(D)(2), which provides in pertinent part that "[u]pon consideration of the relevant evidence raised at trial, the testimony, *other evidence*, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. * * *" (Emphasis added.) We believe that this allowance of "other evidence" permits the prosecutor to rebut, where appropriate, the unsworn statement of the defendant and the testimony of other witnesses. The prosecutor may accomplish this by presenting "other evidence," including testimony of witnesses to contravene the mitigating evidence offered by the defendant.

For example, if the defendant asserts in his unsworn statement, or one of his witnesses testifies, that defendant attends the 9:00 Mass in his local parish every Sunday morning, and if such an assertion is untrue, it would be proper for the prosecutor to call the local parish priest as a rebuttal witness to testify that, to his regret, he had never seen the defendant in church at all.

Considering all the foregoing, one major issue still remains. What are the prosecutor's options, and what is the trial court's responsibility, if the defendant, in his unsworn statement, or one of his witnesses declares that defendant has never been in trouble with the law before this offense, when in fact the defendant has a prior criminal record? May the prosecutor offer and should the trial court permit and accept, evidence of the defendant's prior criminal record so that the jury will have all the facts before it? Has the defendant, by his untruthful or incomplete unsworn statements, placed in issue the mitigating factor described in R.C. 2929.04(B)(5),* so as to permit the state to introduce evidence of the defendant's prior criminal record, if any?

We recognize that the purpose of an unsworn statement is to avoid cross-examination, particularly about one's prior criminal record. Similarly, the defendant in a capital case has the option of requesting a pre-sentence investigation, which may not be undertaken without such a request. R.C. 2929.03(D)(1). We believe this option was also designed to afford the defendant the right to prevent his previous criminal record from being revealed to the sentencing body. It would seem that to permit witnesses for the prosecution to testify as to a defendant's previous criminal history would frustrate the very purpose for which an unsworn statement and a discretionary pre-sentence investigation are statutorily permitted.

However, to permit the defendant to make a false or incomplete unsworn statement regarding his criminal history would present the jury with something less than a full picture. As we have interpreted R.C. 2929.03 today, the prosecutor is accorded great latitude in presenting the state's case in the penalty stage as well as the guilt stage. Therefore, if the defendant falsely claims in his unsworn statement that he has little or no prior criminal history, the prosecutor should be permitted to demonstrate the inaccuracy of this assertion by appropriate evidence, defendant having raised the R.C. 2929.04(B)(5) factor. Similarly, if

* R.C. 2929.04(B)(5) permits the defendant to offer evidence concerning his "* * * lack of a significant history of prior criminal convictions and delinquency adjudications."

the defendant remains silent on this issue, but a mitigation witness called by the defense falsely or incompletely testifies on the extent of the defendant's criminal record, the prosecutor should be permitted to rebut. We hold, therefore, that the prosecutor, in the penalty stage of a capital trial, may rebut false or incomplete statements regarding the defendant's criminal record. This right is limited, however, to those instances where the defense offers a specific assertion, by a mitigation witness or by the defendant, that misrepresents the defendant's prior criminal history.

Appellant next contends that the trial court erred in admitting into evidence, during the penalty stage, a photograph of appellant standing next to a marijuana plant. Appellant argues that the photo, which was referred to by the prosecutor in his final remarks in the penalty stage, was offered for the sole purpose of prodding the jury to impose a harsh penalty.

Admission of the marijuana photograph was error, since its probative value was nonexistent and its potential for prejudice was significant. However, given the overwhelming evidence supporting the existence of the nine aggravating circumstances admitted by appellant, balanced against the relatively unremarkable evidence offered in mitigation (discussed *infra*), it is beyond a reasonable doubt that the jury would have sentenced appellant to death without having seen this photograph. The factors supporting death as a penalty were so persuasive and so numerous that this single photograph cannot be regarded as having materially prejudiced appellant. Thus, the error was harmless beyond a reasonable doubt. Cf. *Thompson*, *supra*, at 9, 514 N.E. 2d at 416.

Appellant next contends that the prosecution engaged in misconduct by reminding the jury that any sentence less than death could result in eventual parole, by alluding to facts not in evidence, by asking the jury why appellant did not call certain persons to the stand, and by appealing to the jury's desire for law and order. In determining whether these remarks constituted reversible error, it is not enough to find that the comments were inappropriate or even universally condemned. *Darden* v. *Wainwright*, *supra*, at 181. The relevant question is whether they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly* v. *DeChristoforo* (1974), 416 U.S. 637, 643.

In *Darden*, *supra*, the United States Supreme Court upheld the conviction and death sentence of a defendant who claimed he had been deprived of a fair trial by prosecutorial misconduct. The prosecutor, in his closing argument in the guilt phase, had referred to the accused as an "animal"; repeatedly expressed his regret that the defendant had not been "blown away" by his victim; and stated his belief that the death sentence was the only way to ensure that the defendant would never be on the streets again. Conceding that these remarks were "undoubtedly improper," *id.* at 180, the court nevertheless held that the comments did not deprive the accused of a fair trial. In so holding, the court found that the prosecution had not manipulated or misstated the evidence, nor had the remarks implicated other rights of the defendant, such as the right to counsel or the right to remain silent. *Id.* at 182. The court further noted that the evidence against the accused was overwhelming, which "reduced the likelihood that the jury's decision was influenced by argument." *Id.*

The remarks by the prosecutor in

Darden were clearly more inflammatory than those complained of herein. The comments in the instant cause did not contaminate the proceedings to the point that appellant's right to a fair trial was destroyed. The evidence supporting the sentence of death in this case was indeed overwhelming. The remarks in question did not render the penalty stage of appellant's trial fundamentally unfair.

While the prosecutorial misconduct in this case does not require a reversal of appellant's sentence, we express our mounting alarm over the increasing incidence of misconduct by both prosecutors and defense counsel in capital cases. We have previously voiced our disapproval of the various forms of misconduct by counsel in such cases. See, *e.g.*, *Thompson*, *supra*, at 14-15, 514 N.E. 2d at 420-421; *Apanovitch*, *supra*, at 24, 514 N.E. 2d at 400. Apparently, our efforts in this regard have been something less than successful, and the avenues for prevention and correction by trial courts, appellate courts and this court are relatively few. Time and again we see counsel misconduct which in many cases would appear to be grounds for reversal and the vacating of convictions and/or sentences. In cases where the evidence of guilt is overwhelming and the statutory criteria have been met for both conviction and sentence of death, we have not chosen this alternative except in rare instances. As indicated, we have previously spoken on this subject and the case before us presents a good example.

As outlined above, the prosecutor in this case openly declared at a pretrial hearing that he did not care whether appellant received fair treatment. Later the prosecutor informed the jury of an alleged knife fight, which was not in evidence, and implied thereby that appellant was guilty of wrongdoing, of which there was absolutely no evidence. Further, the prosecutor commented to the jury on a subsequent conviction of appellant, unsupported by any evidence in the record, and then told the jury that no such conviction existed. The prosecutor then further exhibited and commented on a totally irrelevant photograph depicting appellant next to a marijuana plant. Further, the prosecutor, in his closing remarks at the penalty stage, told the jury that "[i]t's not necessarily true that if you get three counts of twenty to life that it will add up to sixty—that's not necessarily true." While this does not involve a *total* misstatement of the law (see R.C. 2967.13 [D] and [E]), it certainly could be construed as misleading.

While all these comments, taken together or even standing alone, constitute unreasonable and unfair conduct by the prosecutor, we must balance against that conduct the admission of appellant that he brutally stabbed to death a young mother, her daughter and her younger sister and then multilated their bodies by fire. In cases such as this, we cannot ignore the compelling interest of the public, which has every right to expect its criminal justice system to work effectively. Nor can we disregard the defendant's right to a fair trial, which is mandated by the Sixth Amendment to the United States Constitution.

There is one other alternative left to the courts in expressing our condemnation of intentional or unjustifiable misconduct by either prosecutors or defense counsel. Attorneys, trial courts, courts of appeals and this court should remain ever vigilant regarding the duties of counsel as exemplified in the following standards.

DR 1-102(A)(5) of the Ohio Code of Professional Responsibility provides that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice."

DR 7-102(A)(5) states that a lawyer shall not "[k]nowingly make a false statement of law or fact." DR 7-106 provides that an attorney shall not "[s]tate or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."

The proposed standards of the American Bar Association for prosecutors provide in relevant part that "[i]t is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner cannot support by evidence." ABA Standards Relating to the Prosecution Function and the Defense Function, The Prosecution Function (Tent. Draft 1970) 123, Section 5.7(d). These standards further provide that "[t]he prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." *Id.* at 126, Section 5.8(c).

In order to preserve the fairness of trial proceedings and to deter further misconduct, it is henceforth the intention of this court to refer matters of misconduct to the Disciplinary Counsel in those cases where we find it necessary and proper to do so. We encourage all trial courts and appellate courts to take similar steps where appropriate.

Appellant's Proposition of Law XII contends that reversible error was committed in the penalty phase when the prosecutor argued, and the trial court instructed the jury on, mitigating factors not claimed by appellant. He submits that these statements impermissibly focused the jury's attention on the number of available mitigating factors absent from appellant's case.

R.C. 2929.04(B) and (C) deal with mitigation and were designed to enable *the defendant* to raise issues in mitigation and to facilitate his presentation thereof. If the defendant chooses to refrain from raising some of or all the factors available to him, those factors not raised may not be referred to or commented upon the trial court or the prosecution. When the *purpose* of these sections is understood, it is clear that such comment is appropriate only with regard to those factors actually offered in mitigation by the defendant. This is especially apparent when the purpose is considered in conjunction with the mandate found in R.C. 2929.04(B) that "'* * * the court, trial jury, or panel of three judges shall consider, and weigh *against* the aggravating circumstances * * *'" (emphasis added) the listed factors that are presented by way of mitigation. If evidence on any of the factors is not offered by the defendant or if any of the factors would not, in fact, be useful in mitigation, then it would be impossible to weigh those factors *against* the aggravating circumstances.

Further support for this conclusion may be found by reading R.C. 2929.04(C) in conjunction with R.C. 2929.04(B). Subsection (C) provides that "[t]he *defendant* shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section * * *." (Emphasis added.) Thus, it is the defendant who has the right to present and argue the mitigating factors. If he does not do so, no comment on any factors not raised by him is permissible. Likewise, where the defendant does not raise a particular mitigating factor, that factor need not be considered in the opinions of the trial court and the appellate court or in the process of weighing mitigating factors against the aggravating circumstances.

In this case, the trial court read all the statutory mitigating factors to the jury but made no comment on the fac-

tors that were not presented by appellant. This was certainly not prejudicial error, though the better practice is certainly to refrain from even referring to mitigating factors not raised by the defendant.

Moreover, this court has repeatedly held that the sentencing body must consider the statutory mitigating factors raised by the defendant, but need not find that any particular factor exists or that the factors presented by appellant are in fact mitigating. See, *e.g.*, *Steffen*, *supra*, at 116-117, 31 OBR at 278, 509 N.E. 2d at 390; *State* v. *Byrd* (1987), 32 Ohio St. 3d 79, 81, 512 N.E. 2d 611, 615; *State* v. *Stumpf* (1987), 32 Ohio St. 3d 95, 100-101, 512 N.E. 2d 598, 604-605.

In his Proposition of Law XIII, appellant contends that the trial court erred in instructing the jury to disregard considerations of sympathy in its deliberations. This precise argument has been repeatedly rejected by this court. See, *e.g.*, *Jenkins*, *supra*, at paragraph three of the syllabus; *Steffen*, *supra*, at 125, 31 OBR at 285, 509 N.E. 2d at 396; *Byrd*, *supra*, at 86, 512 N.E. 2d at 619. Appellant advances no compelling reasons to alter this court's position.

In his Proposition of Law XIV, appellant first argues that the trial court erred in refusing to consider as mitigating certain evidence offered by appellant in the penalty phase. The evidence which appellant contends that the trial court erroneously rejected was the testimony of appellant's family and friends concerning the good relationship he had with his family, his kind, generous and helpful nature, his work record, and his remorse as expressed in his unsworn statement.

In the separate opinion required by R.C. 2929.03(F), the trial court outlined in considerable detail the evidence offered by appellant in mitigation. In arguing that the trial judge erroneously discounted appellant's mitigating evidence, appellant extracts the following portion from the trial court's opinion:

"The mitigating factors offered to counterbalance the aggravating factors were hardly mitigating factors at all, they were simply sympathy generating factors. Except for the fact that this defendant has a history of no arrests or convictions and has been a non-violent individual, the so-called mitigating factors basically call for emotional considerations of sympathy and mercy."

This court has recently held that:

"While R.C. 2929.04(B)(7) evinces the legislature's intent that a defendant in a capital case be given wide latitude to introduce any evidence the defendant considers to be mitigating, this does not mean that the court is necessarily required to accept as mitigating everything offered by the defendant and admitted. The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." *Steffen*, *supra*, at paragraph two of the syllabus.

While the trial court is required to *consider* any evidence presented by the defendant pursuant to R.C. 2929.04 (B), it is not required to find that such evidence actually constitutes a mitigating factor. *Stumpf*, *supra*, at 101, 512 N.E. 2d at 605. "Under R.C. 2929.04(B), evidence of an offender's history, background and character which the jury, trial court, or panel of three judges considered, but did not find to be mitigating, need be given little or no weight against the aggravating circumstances." *Id.* at paragraph two of the syllabus.

Obviously, the trial court in the instant case considered the evidence presented by appellant, but gave it little

weight in comparison to the aggravating circumstances. In accordance with *Steffen* and *Stumpf*, *supra*, this was not error.

In his Proposition of Law XV, appellant argues that the process for proportionality review in Ohio fails to meet constitutional standards to the extent that the process does not require appellate courts to review and compare cases in which the death penalty was sought but not imposed.

This precise argument was rejected by this court in *Steffen*, *supra*. "The proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." *Id.* at paragraph one of the syllabus. The *Steffen* court specifically found that this standard of proportionality review comports with constitutional requirements. *Id.* at 123, 31 OBR at 283, 509 N.E. 2d at 394.

Appellant's Proposition of Law XVI attacks the constitutionality of the statutory scheme for imposition of the death penalty in Ohio. Appellant concedes that the arguments raised in this proposition echo those addressed and rejected by this court in *Jenkins* and *Maurer*, *supra*. No compelling reasoning is advanced which would affect this court's previous position.

The final tasks to be completed in this court's review of the instant case are the proportionality review and the independent weighing process, both required by R.C. 2929.05(A).

Appellant presents no argument alleging that the death sentence in his case was disproportionate. Compared with the previous death penalty cases decided by this court, the sentence herein is not excessive or disproportionate. Appellant murdered three persons in the course of an aggravated burglary, and then committed aggravated arson. In *State* v. *Brooks* (1986), 25 Ohio St. 3d 144, 25 OBR 190, 495 N.E. 2d 407, the defendant, also convicted of three murders, received the death penalty without the additional aggravating circumstances such as those present here. Many cases wherein the death penalty was imposed and upheld involved only a single victim. See, *e.g.*, *Apanovitch*, *supra*; *Mapes*, *supra*. Clearly, the death sentence imposed on appellant is not disproportionate when compared to the cases previously decided by this court.

Finally, this court is required to independently weigh the evidence and consider the offense and the offender to determine if the aggravating circumstances of which appellant was found guilty outweigh the mitigating factors in this case. R.C. 2929.05(A).

In the penalty phase of the trial, appellant presented twenty witnesses. These witnesses, consisting of appellant's friends and family members, testified that appellant was a helpful, gentle, easy-going person, friendly, well-behaved, and good with children. They stated that he took good care of his father, who suffered a lengthy illness before his death in 1980. Several witnesses testified that appellant's father was extremely strict, occasionally resorting to physical punishment.

In his own unsworn statement to the jury, appellant expressed regret for what he had done and apologized to the family of his victims. He declared that he had never intended to kill anyone, and that he could not explain what had caused him to commit such acts. Appellant stated that he had never been arrested before the night of the murders. He stressed that he had always tried to be a good person, pointing out that he had spared the life of the infant present in the house by

carrying her outside and placing her on a neighbor's porch.

It can be seen from the foregoing that of the specific mitigating factors listed in R.C. 2929.04(B)(1) through (6),[1] appellant raised only one: his lack of a criminal record prior to the offense. The remaining evidence concerned the "history, character, and background of the offender * * *" which are relevant considerations under R.C. 2929.04(B).

Against these considerations this court must weigh all the aggravating circumstances proved beyond a reasonable doubt. We conclude that the mitigating factors in this case pale when compared to the aggravating circumstances, which consist of the horribly brutal murders of a woman and two children and the subsequent destruction of their home and mutilation of their bodies by fire. The nine aggravating circumstances in this case[2] easily outweigh the mitigating factors set forth by appellant.

Of the eleven friends who testified as to appellant's good character, eight had not had much contact with appellant for several years before the murders, which weakens the import of their testimony. With the exception of his somewhat troubled relationship with his father, appellant's family history reflects an apparently normal home environment. Among the volume of testimony offered by appellant, very little can be found which "lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty * * *." *Steffen*, *supra*, at 129, 31 OBR at 289, 509 N.E. 2d at 399.

As to the nature or circumstances of the offense, appellant appears to argue that his treatment of the infant on the night of the murders is mitigating. It is difficult to agree. That appellant committed only three murders when he had the opportunity to commit a fourth can hardly be characterized as an extenuating circumstance.

In short, we find, beyond a reasonable doubt, that the unusual number of aggravating circumstances in this case is not outweighed by the relatively meager mitigating factors offered by appellant. Thus, the sentence of death imposed upon appellant must stand.

Therefore, in accordance with the

[1] The enumerated mitigating factors set forth in R.C. 2929.04(B)(1) through (6) are:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim[.]"

[2] The nine aggravating circumstances of which appellant was found guilty consist of three specifications for each count of aggravated murder. These specifications are as follows: the commission of aggravated murder while committing or attempting to commit the offense of aggravated burglary, the commission of aggravated murder while committing the offense of aggravated arson, and the commission of aggravated murder which was part of a course of conduct involving the purposeful killing of two or more persons.

foregoing, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY and LOCHER, JJ., concur.

HOLMES, J., concurs in the syllabus and judgment only.

WRIGHT and H. BROWN, JJ., concur in part and dissent in part.

WRIGHT, J., concurring in part and dissenting in part. While I would affirm appellant's conviction, I would reverse his sentence of death and remand for resentencing.

I

At the outset, I would stress my respect for my colleagues in the majority because I believe that they share my regard for fundamental fairness and due process. As a court of last resort, it is imperative that we be sensitive to these considerations. However, I must part company with my brethren because the record before us contains examples of prosecutorial misconduct of the worst sort.

Although the majority opinion concedes that the prosecution indulged in misconduct during the penalty stage of the trial, it asserts — in what has become a frequent refrain in far too many criminal cases before us — that the errors were "harmless." Once again, the majority denounces the prosecutorial misconduct obvious in this case, but allows it to continue unheeded, permitting the state to further chip away at the right to fundamental due process and a fair trial pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. As Judge Jerome Frank aptly stated in his classic dissent in *United States* v. *Antowell Fireworks Co.* (C.A. 2, 1946), 155 F. 2d 631, 661:

"This court has several times used vigorous language in denouncing government counsel for such conduct * * *. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offenses, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories, we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court — recalling the bitter tear shed by the Walrus as he ate the oysters — breeds a deplorably cynical attitude towards the judiciary."

In addition, the majority asserts that the prejudicial effect of many of the prosecutor's remarks were "greatly minimized" by curative instructions by the judge, and in a few cases, apologies by the prosecutor and request to the jury that they disregard his remarks. It is pure sophistry to argue that limiting instructions or prosecutorial apologies obviate the serious damage that results from improper comments. The giving of these limiting instructions is akin to trying to efface indelible ink with an eraser. The

more you try to erase the mistake, the more you call attention to it -- until finally you are tearing the very fiber of due process protections.

Judge Learned Hand once wrote that the curative instruction is a "device which satisfies form while it violates substance, that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." *Nash* v. *United States* (C.A. 2, 1932), 54 F. 2d 1006, 1007. Judge Frank stated that such an instruction "is a kind of 'judicial lie'. It undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent administration of justice." *United States* v. *Grunewald* (C.A. 2, 1956), 233 F. 2d 556, 574 (dissenting opinion). And Justice Felix Frankfurter once asserted that the prosecution "should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Delli Paoli* v. *United States* (1957), 352 U.S. 232, 248 (dissenting opinion).

For these reasons, curative instructions are disfavored by courts. But this disfavor rises to a level of condemnation when the error is so egregious that the instructions or comment designed to remove the prejudicial effect are rendered nugatory.[*]

II

The majority places heavy reliance on these two arguments -- "harmless error" and the effective use of curative instructions -- in finding that prosecutorial misconduct in this case was nonprejudicial. As discussed *infra*, I believe the unoward conduct of the prosecution improperly inflamed the passion of the jury and any assertion that such passion was quelled by curative instructions or that the effect on the jury was harmless is without merit.

A

At an evidentiary hearing prior to trial, the state certainly set the tone of the proceedings with the following colloquy between the trial judge and the prosecutor:

"BY THE COURT: Would that be fair to the defendant in this case?

"MR. SAGE: Well I don't care what's fair to the defendant, Your Honor."

In an effort to insure that an accused receives a fair trial, the Code of Professional Responsibility requires the following of the prosecutor:

* * * About a third of the viewers were told the search turned up incriminating evidence, which the judge instructed them to ignore since it wasn't relevant to determining the reasonableness of the police conduct.

"But researchers found that, far from disregarding the results of the search, jurors tended to use them to make sense of preceding events, a phenomenon psychologists call 'hindsight bias.' When evidence of criminality was found, for example, jurors remembered evidence that supported the officers' story. They even remembered the policeman to be experienced--a fact not mentioned in the trial. * * *" *Id.* at col. 2-3.

[*] A recent study by the American Bar Foundation and Northwestern University indicates that juries are not likely to heed a judge's instruction or admonition to ignore certain evidence they have heard. Allen, When Jurors Are Ordered to Ignore Testimony, They Ignore the Order (Jan. 26, 1988), Wall St. J., at 31, col. 3.

"The American Bar Foundation experiment is one of the latest in a growing body of research by social scientists suggesting the limits of judicial admonishments. In the experiment, 538 subjects were shown a videotape of closing arguments in a mock trial of police officers accused of improperly searching the house of a suspected criminal

"The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. * * *" EC 7-13 of the Code of Professional Responsibility.

Standing alone, this flippant remark by the prosecutor was harmless, but what followed certainly was not. As will be shown, the cumulative effect of this misconduct was to deny appellant a fair trial in connection with mitigation.

1

Appellant produced substantial evidence that prior to the terrible offenses for which he was tried, he had not violated the law and had lived a productive life. In an effort to convince the jury that the offenses involved were the product of a one-time instance of aberrational misconduct, twenty witnesses testified concerning appellant's character, personality, and lifestyle.

Among others, Mike Dingledine testified that the appellant was a quiet and easy-going person. On cross-examination, the prosecutor attempted to rebut this testimony by introducing the fact that appellant had previously been involved in a knife fight at a convenience store. Defense counsel objected to the question and moved for a mistrial, alleging that no facts were elicited on direct examination which demonstrated that a knife fight had taken place. Instead, defense counsel explained that appellant walked out of the store and someone stabbed him. No fight actually occurred and the prosecutor reluctantly conceded that he had no evidence to the contrary.

The trial court agreed with defense counsel that a fight had not taken place, stating, "I mean, the fact is, if it wasn't a fight, if he just got stuck with a knife -- that's not a fight." The court sustained the objection, did not grant the mistrial, and gave a curative instruction to the jury to disregard the information concerning the so-called "knife fight."

The tactic used by the prosecutor was clearly improper. "The attempt to communicate by innuendo through the questioning of witnesses when the questioner has no evidence to support the innuendo is improper." *State* v. *Williams* (1977), 51 Ohio St. 2d 112, 119, 5 O.O. 3d 98, 102, 364 N.E. 2d 1364, 1368, vacated as to the death penalty (1978), 438 U.S. 911.

The prosecutor also violated standards set forth by the American Bar Association, which provide that it "is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner cannot support by evidence." ABA Standards Relating to the Prosecution Function and the Defense Function, The Prosecution Function (1970) 39, Section 5.7(d).

While admitting that the prosecutor's action in this regard was improper, the majority states that "it was not so egregious as to require reversal." In other words, the error was harmless.

2

In the present case, appellant was on trial for the crimes of aggravated murder, which occurred on November 23, 1984. After that date, appellant was arrested and convicted for the unrelated crime of receiving stolen property.

No reference was made to the later conviction during the guilt phase; however, the subject was raised at the mitigation hearing. Appellant made an unsworn statement to the jury in which he stated he had "never been arrested or convicted of anything before the night this happened." During the mitigation hearing, the prosecutor told the jury that appellant "wouldn't sit in that [witness] chair because then he would have to answer my questions. And then I would ask him if he's ever been convicted of a criminal offense after the date in question in this case." Defense counsel immediately objected and sought a mistrial, which the trial court denied. Instead, the court gave a "curative" instruction and the prosecutor apologized for a highly improper comment.

In further discussing appellant's unsworn statement, the prosecutor stated:

"The other thing I thought in this case, you know, nothing in this case can be fun, and I don't mean for it to be that way. But the gentleman for the defendant, he told you five different times about the oath you took, and about the oath we all take, and the oath I take, and the oath you take — everybody takes the oath except the defendant; he isn't man enough to get up here and take the oath. Everybody in this case raised his right hand to this man, and he says I solemnly swear to tell the truth, the whole truth and nothing but the truth so help me God. Everybody except DePew."

The majority agrees that the prosecutor exceeded permissible comment on the unsworn statement. The comment did not go to the fact that the defendant's statement had less credibility because it was not under oath; instead, it encompassed another crime committed by appellant. As a result, the comment was clearly prejudicial under any rationale.

In *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, 15 OBR 311, 473 N.E. 2d 264, this court had an opportunity to examine prosecutorial comments on the unsworn nature of a defendant's statement. One of four key factors the *Jenkins* court listed was "the prosecutor's comments were limited to the fact that unlike other witnesses, the statement of appellant was not made under oath." *Id.* at 217, 15 OBR at 357, 473 N.E. 2d at 310. As a result, in *State* v. *Maper* (1985), 19 Ohio St. 3d 108, 19 OBR 318, 484 N.E. 2d 140, and *Jenkins*, this court focused on the importance of the *limited* scope of the prosecutor's comments as determining their propriety.

Since the prosecutor's comments exceeded the limits of commenting on the unsworn nature of the statement, appellant's mitigation hearing was infected with prejudicial information.

The majority holds that the prosecutor's statement that he wanted to ask appellant about a later criminal conviction was "not so prejudicial as to require reversal." Concerning the discussion of the unsworn statement, the majority states: "While the remarks made herein surely exceed the proper scope of comment set forth today, we find that such remarks are harmless error in light of the overwhelming weight of the aggravating circumstances in this case relative to the factors offered in mitigation." I disagree.

3

At the mitigation hearing, a photograph was offered and admitted into evidence that depicted appellant standing next to a marijuana plant. The prosecutor referred to this photograph in his closing argument:

"[S]o we thought we would show you a few things we thought were relevant — we thought were relevant, you know, to the last five years. There it says self and little brother, first year, (unclear) homegrown ten feet tall. Growing a little grass there you see."

The majority concedes that this photograph had no other purpose other than to incite prejudice against appellant. The introduction of and the reference to the photograph were irrelevant for purposes of the sentencing phase of appellant's trial. Nevertheless, the majority again held that admission of "this single photograph" — without reference to the concomitant prosecutorial comments — was harmless error.

4

Finally, the prosecutor made several comments during the closing argument in the mitigation phase of the trial that were so egregious that they clearly denied appellant's right to a fundamentally fair sentencing hearing as guaranteed by the Constitution.

The prosecutor made the following improper comments about the possible sentences that appellant could receive:

"The defense says, and I knew they would, it doesn't make any difference what kind of penalty that you put on him because any sentence you give him is the death sentence. But that's not true. That's not true. Why, my goodness, Sirhan Sirhan is talking about getting out for killing Bobby Kennedy."

After defense counsel objected, the prosecutor continued as follows:

"Well, if Your Honor please, he led them to believe that life means life, and it doesn't necessarily mean that, as the court knows.

"* * *

"Now, you're going to have a list of * * * three options in this case, and you know what the three of them are. But what I'm telling you, when you hear, as the defendant told you, that twenty to life * * * or life with eligibility in twenty means you're going to be there for life — that's not necessarily true.

"It's not necessarily true that if you get three counts of twenty to life that it will add up to sixty — that's not necessarily true. And that's the way the law is."

The prosecutor misstated the law and was speculating as to the possibility that appellant could receive parole, which could shorten his sentence. The possibility of parole is outside the province of the jury and impossible under the present law. *California* v. *Ramos* (1983), 463 U.S. 992, 1026, fn. 13. *Farmer* v. *State* (Tenn. 1974), 520 S.W. 2d 609, 609. As the Tennessee Supreme Court noted in *Farmer* v. *State*, *supra*, at 614, jurors should not be informed about the possibility of parole because "jurors tend to attempt to compensate for future clemency by imposing harsher sentences." Similarly, in the present case appellant was prejudiced beyond doubt because the jurors may have imposed a harsher sentence because of the prosecutor's comments.

In addition, Prosecutor Holcomb alluded to several facts in the closing argument that were not in evidence. The prosecutor told the jury that appellant's confession was not voluntary in that appellant made the confession only after he knew his girlfriend had turned him in, which was four months after the crime. Nothing in the trial record supports the foregoing statement. Although defense counsel did not object, a prosecutorial argument reciting facts not in evidence is plain

error "[w]here an error seriously affects the basic fairness of the judicial process." *State* v. *Gordin* (Nov. 23, 1977), Hamilton App. No. C-76510, unreported, at 35.

The prosecutor also asked the jurors why appellant did not present certain witnesses in the mitigation phase. In particular, the prosecutor asked the jurors why Debbie Sowers did not testify. He suggested that Sowers did not testify because she would then be subjected to cross-examination. The innuendo is that appellant was hiding something. Once again, the prosecutor was referring to facts outside the record and improperly bringing to the jurors' attention witnesses who did not testify on behalf of the appellant.

Relying on *Darden* v. *Wainwright* (1986), 477 U.S. 168, 181, the majority conceded that these remarks were improper but held that they "did not render the penalty stage of appellant's trial fundamentally unfair." In other words, the majority again found "harmless error."

The majority's reliance on *Darden*, however, is misplaced for several reasons. First, the prosecutorial remarks challenged in *Darden* occurred during the guilt-innocence stage of the trial and not the penalty stage, as in the case here. Second, the *Darden* case involved altogether different prosecutorial comments than those expounded by the prosecutor in the instant case[19] and much of the objectionable content in *Darden* was invited by or was responsive to remarks by defense counsel. Finally, the *Darden* case stated -- and today's majority attempts to echo -- that the prosecutor's arguments "did not manipulate or misstate the evidence." *Id.* at 182. While that may have been true in *Darden*, it certainly is not the case here. The prosecutor's statement to the jury that "[i]t's not necessarily true that if you get three counts of twenty to life that it will add up to sixty -- that's not necessarily true" is a clear-cut misstatement of law. The majority's suggestion that this comment "does not involve a *total* misstatement of the law" is inherently illogical. In addition, it is obvious that many of the prosecutor's improper comments concerning facts not in evidence, some of which he apologized to the jury for making, obviously involve a manipulation of the evidence, which is clearly proscribed by *Darden*.

B

In addressing the various acts of prosecutorial misconduct, the majority treats the improper remarks and comments by the prosecutor divisibly -- as individual errors. But prosecutorial misconduct is indivisible. The improper remarks made by the prosecutor in this case were not made in a vacuum; they were made to an impressionable jury.

Individually, which was the way the aforementioned errors were treated by the majority, some of the prosecutorial misconduct may indeed have proved harmless. But the cumulative effect of these transgressions, which was the true effect felt by the jury, denied appellant a fair trial. See *State* v. *Brule* (1986), 38 Ohio St. 3d

[19] In *Darden*, the prosecutor attempted to place some of the blame for the crime on the Division of Corrections because the defendant was on a weekend furlough from a prison when the crime occurred. The prosecutor also implied the death penalty would be the only guarantee against a future similar act and characterized the defendant as an "animal" after defense counsel stated that the perpetrator of the crimes was an "animal." *Id.* at 179-180.

25, 46, ___ N.E. 2d ___, ___ (Wright, J., dissenting).

As the United States Court of Appeals for the Eleventh Circuit stated when it addressed the harmful effects of prosecutorial misconduct in a case such as this: "[I]t is most important that the sentencing phase of the [capital] trial not be influenced by passion, prejudice, or any other arbitrary factor * * * With a man's life at stake, a prosecutor should not play on the passions of the jury." *Hance* v. *Zant* (C.A. 11, 1983), 696 F. 2d 940, 951, certiorari denied (1983), 462 U.S. 1210.

C

Finally, I find the majority's "solution" to the problem of prejudicial prosecutorial misconduct particularly troublesome.

Unlike most of the countries throughout the world, our system is keyed to fair play and places the prosecution in the oftimes difficult position of being a vigorous advocate for guilt and punishment while at the same time a defender of the accused's right to a fair trial.

Historically, the courts have ordered a new trial when the representative of the state strays from this role in a substantial fashion. The majority opinion concedes that repeated departures from the norm occurred by way of egregious misconduct by the state. A substantial amount of mitigating testimony was given in this case and the jury deliberated at great length.

I am troubled by the seeming departure from past case law that would compel reversal of the penalty phase of these proceedings and the suggestion that we should handle blatant prosecutorial misconduct through the Office of Disciplinary Counsel. I submit that this is cold comfort to the appellant who faces death by electrocution.

III

As I previously mentioned, I by no means intend to suggest that my colleagues in the majority are insensitive to the due process rights of appellant. Such a most certainly not the case. However, by implication and direct comment, they clearly suggest that the public demands retribution by way of the death sentence where the facts reveal a brutal and senseless murder. I share this sense of outrage. Where we part company is the method used to achieve the ultimate goal in our Anglo-American system of criminal jurisprudence.

I cannot accept the notion that a popular result can always be equated with defending the rights of a criminal defendant. I am painfully aware that the "unpopular" position I take today will gain no plaudits but that is often the case when a court is dealing with the due process rights of an accused.

Therefore, for the foregoing reasons, I respectfully dissent from the result achieved by the majority.

H. Brown, J., concurs in the foregoing dissenting opinion.

ASSIGNMENTS OF ERROR RAISED IN THE THIRTEEN DISTRICT COURT OF APPEALS

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT-APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

WHEN A DEFENDANT IS ARRESTED AND REQUESTS AN ATTORNEY AT THE SCENE OF HIS ARREST; IS INTERVIEWED INCOMMUNICADO FOR SIX AND ONE-HALF HOURS BEFORE ADMITTING TO A CRIME; IS FORCED TO STAY AWAKE NEARLY 24 HOURS BEFORE SIGNING A WRITTEN WAIVER OF HIS MIRANDA RIGHTS; AND HIS ATTORNEY IS PREVENTED BY THE POLICE FROM CONSULTING WITH HIM; THE INCRIMINATING STATEMENT CANNOT BE FOUND TO BE VOLUNTARILY GIVEN.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN BOTH THE COURT AND THE STATE REFERRED TO THE JURY VERDICT IN THE PENALTY PHASE OF THE TRIAL AS A "RECOMMENDATION" OF DEATH.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

IN THE PENALTY PHASE OF A CAPITAL MURDER CASE, A JURY IS NOT PERMITTED TO KNOW THAT ITS DECISION IS A "RECOMMENDATION," FOR THAT WILL TEND TO DILUTE THEIR RESPONSIBILITY AND WILL LEAD THEM TO MINIMIZE THE IMPORTANCE OF THEIR ROLE.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT A MISTRIAL AFTER THE STATE IMPROPERLY QUESTIONED A DEFENSE WITNESS IN THE MITIGATION PHASE OF THE TRIAL WHEN THE STATE ATTEMPTED TO RAISE, THROUGH INNUENDO, INADMISSIBLE EVIDENCE THAT WAS NOT SUPPORTED BY ANY FACTS.

ISSUE PRESENT FOR REVIEW AND ARGUMENT

WHEN THE STATE ASKS A QUESTION OF A WITNESS, WHICH QUESTION HAS NO BASIS IN FACT AND WHOSE INNUENDO PUTS THE DEFENDANT IN A FALSE LIGHT TO A JURY IN THE MITIGATION PHASE OF A CAPITAL CASE, THE TRIAL COURT MUST DECLARE A MISTRIAL.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT REFUSED TO DECLARE A MISTRIAL AFTER THE STATE VIOLATED THE COURT'S ORDER IN LIMINE AND COMMENTED ON THE DEFENDANT'S POST-ARREST CONVICTION ON AN UNRELATED MATTER.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

IN THE MITIGATION PHASE OF A CAPITAL CASE, WHEN THE STATE VIOLATES A COURT ORDER IN LIMINE PREVENTING ANY MENTION OF THE DEFENDANT'S CRIMINAL RECORD SUBSEQUENT TO THE OFFENSE IN QUESTION, THE DEFENDANT IS ENTITLED TO A MISTRIAL.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENDANT'S MOTION IN LIMINE AND PERMITTED CERTAIN POSTER SIZE PHOTOGRAPHS OF THE VICTIMS TO BE ADMITTED INTO EVIDENCE.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

WHEN PHOTOGRAPHS OF CHARRED BODIES ARE BLOWN UP TO LIFE SIZE PROPORTIONS, THEIR PREJUDICIAL EFFECT OUTWEIGHS ANY PROBATIVE VALUE, AND AS SUCH, SHOULD NOT BE ADMISSIBLE.

SIXTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENDANT'S MOTION IN LIMINE TO DECLARE DEBORAH SOWERS TO BE THE COMMON LAW WIFE OF RHETT DEPEW AND THUS PROHIBIT HER TESTIMONY.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT . . . . . .

WHEN THE EVIDENCE CLEARLY AND CONVINCINGLY PROVES THAT THE DEFENDANT HAD ENTERED INTO A COMMON LAW MARRIAGE, THE DEFENDANT'S COMMON LAW WIFE IS PROHIBITED BOTH BY COMPETENCY AND PRIVILEGE FROM TESTIFYING AGAINST HIM.

SEVENTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT ACCEPTED THE JURY'S RECOMMENDATION OF THE DEATH PENALTY.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

A TRIAL COURT WILL INCORRECTLY ORDER A SENTENCE OF DEATH WHEN IT REFUSES TO PROPERLY CONSIDER ALL MITIGATING FACTORS.

EIGHTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT OVERRULED VARIOUS MOTIONS FILED BY THE DEFENDANT REGARDING VARIOUS ASPECTS OF THE DEATH PENALTY STATUTE.

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

ENTRY

STATE OF OHIO, : CASE NO. CA85-07-075

Plaintiff-Appellee :

'87 JUN 29 AM [illegible]

CLERK OF COURTS
EDWARD S ROBB

-vs- :

RHETT GILBERT DEPEW, : SEPARATE OPINION PURSUANT TO R.C. 2929.05(A)

Defendant-Appellant :

Pursuant to R.C. 2929.05(A), this court certifies that it has reviewed the judgment, the sentence of death, the transcript and all of the facts and other evidence in the record in this case and makes the following independent findings:

1) The evidence supports the finding by the jury that appellant Rhett G. Depew was guilty of three counts of aggravated murder and the aggravating circumstances charged in the indictment.
2) The aggravating circumstances for which appellant was found guilty outweigh the mitigating factors in this case.
3) The death sentence is not excessive or disproportionate to the sentence imposed in similar cases.
4) The sentence of death is appropriate in this case.

In making this certification and these findings, this court incorporates its full opinion affirming the conviction and sentence in this case into this separate opinion pursuant to R.C. 2929.05(A).

Judgment affirmed.

FILED in Court of Appeals
BUTLER COUNTY, OHIO
JUN 29 1987
EDWARD S. ROBB, JR.
CLERK

William W. Young, Presiding Judge

James A. Brogan, Judge

John W. Keefe, Judge

46; : 22 844

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY JUDGMENT

'87 JUN 29 AM [illegible]

STATE OF OHIO, : CASE NO. CA85-07-075

Plaintiff-Appellee CLERK OF COURTS :
EDWARD S ROBB

-vs-

FILED in Court of Appeals
BUTLER COUNTY, OHIO
JUN 29 1987
EDWARD S. ROBB, JR.
CLERK

RHETT GILBERT DEPEW, JUDGMENT ENTRY

Defendant-Appellant

The assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Butler County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

FILED in Common Pleas Court
BUTLER COUNTY, OHIO
JUN 29 1987
EDWARD S. ROBB, JR.
CLERK

William W. Young, Presiding Judge

James A. Brogan, Judge

John W. Keefe, Judge

J. . ?

IN THE COURT OF APPEALS ENTRY

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

'87

CLERK OF COURT
EDWARD S. ROBB, JR.

STATE OF OHIO, : CASE NO. CA85-07-075

Plaintiff-Appellee

FILED in Court of Appeals
BUTLER COUNTY, OHIO
JUN 29 1987
EDWARD S. ROBB, JR.
CLERK

-vs-

RHETT GILBERT DEPEW, : O P I N I O N

Defendant-Appellant : 6/29/87

John F. Holcomb, Butler County Prosecutor, Daniel G. Eichel, and Michael J. Sage, Butler County Courthouse, Hamilton, Ohio 45012-0515, for plaintiff-appellee.

John A. Garretson, 616 Dayton Street, Hamilton, Ohio 45012-1166, and Fred Miller, 508 Rentschler Building, Hamilton, Ohio 45011, for defendant-appellant.

YOUNG, P.J.

On the evening of November 23, 1984, the bodies of Teresa Jones, Aubrey Jones and Elizabeth Burton were discovered in the fire-engulfed Jones' home on Oxford-Millville Road in Oxford by local firefighters. An autopsy revealed that Teresa, age twenty-seven, had died from fourteen stab wounds. Her daughter, Aubrey, age seven, had died from twenty-one stab wounds. Teresa's sis-

J____?_

ter, Elizabeth, age twelve, died primarily from five stab wounds as well as contributing factors of fluid loss from burns to her body and carbon monoxide in her lungs.

On April 3, 1985, Detective Sergeant Rick Sizemore went to the home of Deborah Sowers to question her about the homicides. She accompanied Sizemore to the Middletown Police Station where Sowers gave a statement implicating Rhett Depew, defendant-appellant, for the triple murders.

Based on information supplied by Sowers, Sizemore and Detective Joe Rooks located appellant at a trailer park in Oxford on April 4, 1985. Appellant was picked up on an outstanding warrant unrelated to the murders. The detectives took appellant to the prosecuting attorney's office in Hamilton. Appellant was questioned for several hours about the murders and gave a tape-recorded statement where he confessed to the crimes. In his confession, appellant established the following sequence of events.

In 1982, appellant and Sowers had leased and lived in the basement of the Jones' home when Tony Jones, Teresa's husband, was laid off from his job. After several months, Tony Jones evicted both appellant and Sowers from his house. During the tenancy, appellant claimed that several of his pots and pans had been destroyed by Jones for which appellant had threatened to get even.

On the night of November 23, 1985, appellant decided to burglarize the Jones' home in order to get money for the destroyed

pots and pans. He and Sowers drove by the Jones' home several times before appellant determined that no one was home. Appellant entered the house alone and began looking in the hall closet where he remembered Tony Jones had kept money. Appellant was startled when the three victims began screaming. He "freaked out" and started swinging his knife. After he stabbed the victims numerous times, appellant set clothes in a closet on fire. Before leaving, appellant heard noises and found the baby, Megan, in her crib. He wrapped her in a blanket and put her on the neighbor's front porch before fleeing the crime scene.

Subsequently, appellant was indicted on April 5, 1985 for three counts of aggravated murder while committing aggravated burglary in violation of R.C. 2903.01(B). Each murder count contained the following death penalty specifications: appellant committed the murders while committing aggravated burglary; appellant committed the murders while committing aggravated arson; and the murders were part of a course of conduct involving the purposeful killing of two or more persons. R.C. 2929.04 (A)(5), (7).

Appellant entered a plea of not guilty on April 12, 1985. On May 31, 1985, a hearing was held in response to appellant's motion to suppress his statement given to the police. The motion to suppress was overruled by the trial court.

The jury trial began on June 17, 1985. Following the presentation of the state's case, appellant rested without presenting

any evidence. The jury found appellant guilty of all three counts of the indictment and the accompanying specifications.

Thereafter, the sentencing phase of the trial commenced. Appellant presented twenty witnesses in addition to making an unsworn statement. Upon deliberation, the jury found that the aggravating circumstances outweighed any mitigating factors beyond a reasonable doubt and therefore returned a verdict recommending appellant be sentenced to death. The recommended sentence was imposed by the trial court after making an independent determination that the aggravating circumstances outweighed the mitigating factors.

On appeal, the following eight assignments of error are raised by appellant:

ASSIGNMENT OF ERROR NO. 1:

"THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT-APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT."

ASSIGNMENT OF ERROR NO. 2:

"THE TRIAL COURT ERRED WHEN BOTH THE COURT AND THE STATE REFERRED TO THE JURY VERDICT IN THE PENALTY PHASE OF THE TRIAL AS A 'RECOMMENDATION' OF DEATH."

ASSIGNMENT OF ERROR NO. 3:

"THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT A MISTRIAL AFTER THE STATE IMPROPERLY QUESTIONED A DEFENSE WITNESS IN THE MITIGATION PHASE OF THE TRIAL WHEN THE STATE ATTEMPTED TO RAISE, THROUGH INNUENDO, INADMISSIBLE EVIDENCE THAT WAS NOT SUPPORTED BY ANY FACTS."

ASSIGNMENT OF ERROR NO. 4:

"THE TRIAL COURT ERRED WHEN IT REFUSED TO DECLARE A MISTRIAL AFTER THE STATE VIOLATED THE COURT'S ORDER IN LIMINE AND COMMENTED ON THE DEFENDANT'S POST-ARREST CONVICTION ON AN UNRELATED MATTER."

ASSIGNMENT OF ERROR NO. 5:

"THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENDANT'S MOTION IN LIMINE AND PERMITTED CERTAIN POSTER SIZE PHOTOGRAPHS OF THE VICTIMS TO BE ADMITTED INTO EVIDENCE."

ASSIGNMENT OF ERROR NO. 6:

"THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENDANT'S MOTION IN LIMINE TO DECLARE DEBORAH SOWERS TO BE THE COMMON LAW WIFE OF RHETT DEPEW AND THUS PROHIBIT HER TESTIMONY."

ASSIGNMENT OF ERROR NO. 7:

"THE TRIAL COURT ERRED WHEN IT ACCEPTED THE JURY'S RECOMMENDATION OF THE DEATH PENALTY."

ASSIGNMENT OF ERROR NO. 8:

"THE TRIAL COURT ERRED WHEN IT OVERRULED VARIOUS MOTIONS FILED BY THE DEFENDANT REGARDING VARIOUS ASPECTS OF THE DEATH PENALTY STATUTE."

I

In his first assignment of error, appellant alleges that the trial court erred when it overruled his motion to suppress his statement made to police officers at the Butler County Prosecutor's office. At the hearing on the motion to suppress, appellant presented testimony that, at the time of his arrest, he

requested his uncle to call appellant's attorney. The state presented testimony from the arresting officer that at no time did appellant mention the word "lawyer" or ask for an attorney to represent him even though he was advised of his rights under the requirements set forth in Miranda v. Arizona (1966), 384 U.S. 436, 86 S.Ct. 1602.

The trial court found that, if a request for an attorney was made, it was made prior to being handcuffed and taken into custody either before or during the time appellant was handing over his valuables to others, and the request could not have been heard by the arresting officer.

In Edwards v. Arizona (1981), 451 U.S. 477, 101 S.Ct. 1880, the Supreme Court held that, once an accused expresses a desire to have counsel present, further interrogation cannot occur until counsel has been made available to the accused unless the accused himself initiates further communication, exchanges, or conversations with the police. Thus, in the case sub judice, if appellant indicated a desire for counsel, all further statements made in the absence of counsel would be subject to suppression.

The record in this case discloses fundamentally divergent accounts of the events surrounding the arrest of appellant and whether or not appellant indicated a desire for counsel. The Supreme Court of Ohio has held that, where a record discloses fundamentally divergent accounts of the events surrounding a defendant's confession, evidence, including the testimony of both

defendant and the interrogating or arresting officer, warranted the trial court in concluding that the defendant had been fully advised of his rights, had requested no attorney and had failed to indicate that he desired to remain silent. State v. Cornely (1978), 56 Ohio St. 2d 1.

It is fundamental that the weight of the evidence and credibility of witnesses are primarily for the trier of facts. State v. DeHass (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus. This principle is applicable to suppression hearings as well as trials. State v. Fanning (1982), 1 Ohio St. 3d 19, 20.

Absent a finding that the trial court's decision was against the manifest weight of the evidence, this court will not substitute its judgment for that of the trial court.

A further claim of appellant regarding his motion to suppress centers on the arresting officers taking appellant to the prosecutor's office instead of the jail which resulted in an attorney being unable to locate appellant while he was questioned by the officers.

Testimony at the hearing on the motion to suppress showed members of appellant's family contacted an attorney to find out what charges appellant was facing and to attempt to secure his release on bond. The attorney contacted the jail where he told officers he wanted to know when appellant arrived because he wanted to talk to appellant as he would "probably" represent appellant.

We have no problem distinguishing between an attorney's desire to counsel with a potential client and an accused's invocation of his constitutional right to the presence of counsel. In the case sub judice appellant gave a statement to officers, evidently oblivious that an attorney was attempting to contact him. The Supreme Court stated in Moran v. Burbine (1986), 475 U.S. ___, 106 S.Ct. 1135, 1141-42:

> "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. *** Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law."

The determinative factor therefore is the desire of the accused to consult with counsel, not the desire of counsel to consult with the accused. State v. Carder (1966), 9 Ohio St. 2d 1, 7.

We have examined the proceedings on the motion to suppress in their entirety and find that the record supports the finding of the trial court. The first assignment of error is accordingly overruled.

II

In his second assignment of error, appellant alleges the trial court erred when both the court and the state referred to

the jury verdict at the penalty phase of the trial as a "recommendation" of death. Appellant relies primarily upon Caldwell v. Mississippi (1985), 472 U.S. 320, 105 S.Ct. 2633, for the proposition that, in the penalty phase of a capital murder case, a jury is not permitted to know that its decision is a "recommendation," for that will tend to dilute the jurors' responsibility and will lead them to minimize the importance of their role.

In Caldwell, the prosecution in its closing argument in the penalty phase, told the jury that its decision as to the death penalty was not final, but that the decision was automatically reviewable by the Mississippi Supreme Court. Id. at 325-326, 105 S.Ct. at 2637-2638. The jury returned a death sentence which was affirmed by an equally divided Mississippi Supreme Court. The United States Supreme Court reversed the death sentence and concluded "*** that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 323, 105 S.Ct. at 2639.

The Ohio Supreme Court has faced the issue raised in Caldwell and by appellant on numerous occasions and has repeatedly held that, although not preferred, such comment by the prosecutor or by the trial judge on the question of who bears the ultimate responsibility for determining the penalty does not constitute reversible error if the comment was an accurate statement

of the law and was not made to induce reliance on the appellate process. State v. Rogers (1986), 28 Ohio St. 3d 427; State v. Scott (1986), 26 Ohio St. 3d 92; State v. Williams (1986), 23 Ohio St. 3d 16; State v. Buell (1986), 22 Ohio St. 3d 124; State v. Jenkins (1984), 15 Ohio St. 3d 164. Our review, therefore, must focus on the accuracy of the comments made by the prosecutor and the trial court and the potential effect of those comments on the jury.

Under Ohio's statutory framework, both the jury and the trial court must make an independent finding as to whether the statutory aggravating circumstances outweigh the mitigating factors offered by the defendant. R.C. 2929.03(D). If the jury unanimously finds beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, the jury must recommend to the court that the death sentence be imposed. R.C. 2929.03(D)(2). Absent such a finding, the jury recommends either life imprisonment with parole eligibility after twenty full years or life imprisonment with parole eligibility after thirty full years. Id. If the jury recommends a life sentence, the trial court is bound by that determination. The court is not bound, however, by the jury's recommendation of a death sentence. State v. Williams, supra. The trial court may accept or reject the jury's recommendation of death, based upon its independent weighing of the aggravating circumstances and mitigating factors. Independent review is also required of the court of appeals and

the Supreme Court. R.C. 2929.05(A). This type of multi-leveled appellate review of the trial court's written findings justifying imposition of death serves as an additional safeguard against capriciousness or unjust bias. State v. Buell, supra.

During the penalty phase of the trial in the case sub judice, the state phrased its arguments according to the statute and never mentioned the appellate process or invited the jury to rely on later judgments. The state did not mislead the jury as to its role in the sentencing process. In fact, the state advised the jury to consider its role carefully:

> "In your instructions you're going to see one thing, [sic] that I want to direct your attention to. You're going to see this. If the mitigating factors do not outweigh the aggravating circumstances, the jury shall recommend death. It says shall. That is your duty. Weigh your recommended penalty in a logical manner and a reasonable manner. Return a just verdict based on the facts and on the law."

These comments were restrained in emphasis and contained an accurate statement of the law as codified in R.C. 2929.03(D)(2). Therefore, it was not error for the state to refer to the jury verdict as a "recommendation." State v. Rogers, supra.

Appellant also alleges error in the trial court's charge to the jury in the penalty phase. The court instructed the jury, in relevant part, as follows:

> "All twelve jurors must agree on a verdict. If all twelve members of the jury find, by proof beyond a reasonable doubt that the aggravating circumstances which Rhett Gilbert DePew was found guilty of commit-

> ting, outweigh the mitigating factors, then you must return such finding to the Court. As a matter of law, you would have no choice but to recommend to the Court that the sentence of death be ordered.
>
> "You must understand however, that a jury recommendation to the Court that the death penalty be imposed is just that - a recommendation. Therefore, if you recommend the death penalty, the law requires the Court to decide whether or not the defendant Rhett Gilbert DePew will actually be sentenced to death or to life imprisonment.
>
> "On the other hand, after considering all of the relevant evidence submitted at the two phases of this trial, and the arguments of counsel, you find that the State of Ohio failed to prove that the aggravated circumstances that the defendant Rhett Gilbert DePew was found guilty of committing, outweigh the mitigating factors, then you will return a verdict reflecting this decision.
>
> "In this event, you will determine which of two possible life imprisonment sentences to recommend to the Court. In this event your recommendation to the Court shall be one of the following.
>
> "One, that Rhett Gilbert DePew be sentenced to life imprisonment with parole eligibility after twenty full years of imprisonment, or two, that Rhett Gilbert DePew be sentenced to life imprisonment with parole eligibility after thirty full years of imprisonment.
>
> "You must understand if you make one of these particular recommendations it will be binding upon the Court and the Court must impose the specific life sentence you recommend."

This instruction precisely sets forth the capital sentencing procedure of R.C. 2929.03(D)(2) and (3). The charge was not inaccurate or misleading, nor was its effect upon the jury con-

stitutionally infirm. State v. Bell, supra. Accordingly, appellant's second assignment of error is overruled.

III

Appellant, in his third assignment of error, alleges that the trial court erred in failing to grant a mistrial based on the prosecutor's improper questioning of a witness during the penalty phase of the trial. Appellant claims that, because of the prosecutor's misconduct, he was deprived of a fair and impartial trial.

Specifically, appellant called Mike Dingeldine during the penalty phase of the trial to testify that appellant was a peaceful and quiet person. The prosecutor, in cross-examining Dingeldine, asked the following:

"Q. You knew him to carry a knife, right?

"A. A small pocket knife.

"Q. Did you ever see him carry a large knife in his jacket or anything?

"A. No.

"Q. You knew he got cut in a knife fight over at King Kwik, didn't you?

"A. Yes, I did.

"Q. You knew he had trouble with his first wife, right?

"MR. GARRETSON: Your Honor, I object to this line of questioning."

At the ensuing bench conference, the prosecutor explained he asked about a knife fight to show appellant was not a peaceful person. Appellant, however, pointed out that appellant was not in a knife fight but had been the victim of a stabbing at King Kwik. Appellant therefore moved for a mistrial because the prosecutor lacked a good faith basis for the question. The motion was overruled, but the trial court gave a curative instruction to the jury to disregard any mention of a knife fight.

It is apparent that the state, by asking about a knife fight, was trying to characterize appellant as a violent person. Nothing in the record, however, indicates any foundation for this question. The Ohio Supreme Court has previously stated that "[t]he attempt to communicate by innuendo through the questioning of witnesses when the questioner has no evidence to support the innuendo is improper." State v. Williams (1977), 51 Ohio St. 2d 112, 119 (citations omitted), vacated in part on other grounds (1978), 438 U.S. 911.

We find it was error for the prosecutor to ask about a knife fight without any foundation on which to base the question. In deciding whether the trial court should have granted a mistrial based on this error, we must determine whether the question "*** so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo (1974), 416 U.S. 637, 643, 94 S.Ct. 1868, 1871; Darden v.

Wainwright (1986), ___ U.S. ___, 106 S.Ct. 2464, 2472. Furthermore, we note that the Eighth Amendment requires a heightened degree of reliability where determining if death is an appropriate punishment for a defendant. See Caldwell v. Mississippi, supra; Woodson v. North Carolina (1976), 428 U.S. 280, 305, 96 S.Ct. 2978, 2991.

Our analysis revolves around the effect of the prosecutor's question on the jury's decision to recommend the death penalty. Given the circumstances surrounding this case, we must conclude that the error was harmless. Even if the question concerning the knife fight had not been asked, we believe beyond a reasonable doubt that the jury's verdict in the penalty phase would not have been different. Accordingly, as the prosecutor's question did not have the effect of denying appellant a fair and impartial trial, this assignment of error is overruled.

IV

Appellant next argues in his fourth assignment of error that comments made by the prosecutor during the closing arguments of the sentencing phase of the trial resulted in prejudical error.

The prosecutor's argument was as follows:

> "**** [Appellant] wouldn't sit in that chair because then he would have to answer my questions. And then I would ask him if he's ever been convicted of a criminal offense after the date in question in this case. And I would have ***
>
> "MR. GARRETSON: Your Honor ***

> "BY THE COURT: And I will sustain the objection. The jury will disregard that comment."

Appellant's trial counsel then approached the bench and moved for a mistrial. Counsel noted that the court had previously granted appellant's motion in limine to prevent disclosure of any arrests or convictions of appellant that had taken place after the date of the homicides. Counsel argued that the prosecutor's statement, by insinuating that appellant was convicted of a subsequent offense, tended to discredit appellant's only statutory mitigating factor which was his lack of a criminal record.

While even the state concedes that the prosecution erred in making the comment about subsequent convictions to the jury, this misconduct by itself does not mean that appellant was denied a fair and impartial trial. Again, using the standard set forth in Donnelly v. DeChristoforo and Darden v. Wainwright, supra, we must determine whether the prosecutor's remarks so infected the trial with unfairness as to render the sentence of appellant a denial of due process.

As stated by the suprene court in Golamb v. Layton (1950), 154 Ohio St. 305, paragraphs three and four of the syllabus:

> "Although misconduct of counsel in argument to the jury is ever to be condemned, it does not always constitute grounds for ordering a mistrial or reversing a judgment. If the trial court promptly intervenes by admonition to counsel and appropriate instruction and it appears that a verdict for the party represented by such offending counsel is clearly justified by

the evidence, the verdict may be allowed to stand.

> "Such matters often rest in the sound discretion of the trial court and where it is apparent from the peculiar facts and circumstances of the particular case that such discretion has not been abused a reviewing court will not ordinarily interfere."

The record shows that the trial court promptly instructed the jury to disregard the comment by stating:

> "Ladies and gentlemen, there's no evidence in this case about any reference to such convictions, and you must not draw any inference from any argument of the prosecutor's office, because it's improper to make reference to anything that is not in evidence, and this is not evidence and in no way should this jury consider it, or consider that such a conviction exists."

Thereafter, the prosecutor continued his closing argument by prefacing it with the following:

> "Yes, Your Honor, I would sincerely like to apologize for asking that question, and I would tell the jury to disregard it; I shouldn't have said that. I wish you would just forget that because there's nothing like that here."

Furthermore, the trial court instructed the jury that the closing arguments of counsel were not evidence.

While the comments of the prosecutor were error, we find that they did not deprive appellant of a fair and impartial trial. First, any prejudicial effect was minimized by the court's instructions to the jury to disregard the prosecutor's comments. Second, the prosecutor's retraction of the offending comments to the jury diminished any prejudice. Third, as was the

situation in State v. Maurer (1984), 15 Ohio St. 3d 239, 269, "*** because the evidence against appellant was so overwhelming, any harmful effect of the prosecutor's comments paled by comparison." For these reasons, this assignment of error is overruled.

V

Under the fifth assignment of error, appellant argues that the trial court erred when it permitted certain poster-size photographs of the victims to be admitted into evidence. The state introduced a series of 20" x 30" enlarged color autopsy photographs depicting the front and back of each of the three victims for a total of six photographs. Appellant contends that the enlargements were especially gruesome and prejudicial because of their size. Therefore, under Evid. R. 403[1] and 611(A)[2],

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[1] Evid. R. 403 states:

"(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

"(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

---

[2] Evid. R. 611 provides in part:

"(A) The court shall exercise reasonable control

appellant argues that the trial court abused its discretion in admitting the enlarged photographs at the trial.

Generally, the trial court is vested with broad discretion to admit photographs subject to a determination whether their probative value outweighs any unfair prejudice to the defendant. The mere fact photographs are enlarged, however, does not in and of itself render the photographs inadmissible. State v. Sheppard (1955), 100 Ohio App. 345, 386, affirmed 165 Ohio St. 293. Neither does the gruesomeness of a photograph cause it to be per se inadmissible. State v. Maurer, supra, at 265; State v. Woodards (1966), 6 Ohio St. 2d 14, 25.

The six photographs in the case sub judice depicted the knife wounds and thermal injury of the three victims. At trial, the state had the burden of proving, and the jury had to find, that the killings were purposely done. The number of wounds inflicted, the places where the knife entered the body, and the resulting wounds were all probative evidence of a purpose to cause the deaths. See Maurer, supra, at 265; State v. Strodes

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over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

(1976), 48 Ohio St. 2d 113, 116, vacated in part on other grounds (1978), 438 U.S. 911.

Additionally, the photographs were properly introduced to illustrate the testimony of the county coroner. Such illustrative photographs are generally admissible. State v. Maurer, supra.

Upon a careful review of the six photographs, we cannot say that the total probative value of the photographs was outweighed by the danger of prejudice to appellant. Moreover, the photographs were neither repetitive nor cumulative. For these reasons, appellant's fifth assignment of error is not well-taken.

VI

The sixth assignment of error contends that the trial court erred in overruling appellant's motion to declare Deborah Sowers his common-law wife. The effect of finding that a common-law marriage existed would have been to preclude Sowers from testifying against appellant at trial.

Although common-law marriages are not favored in Ohio, such marriages are recognized provided certain elements are present. All necessary elements of the relationship must be shown by clear and convincing evidence, however, as common-law marriages contravene public policy.

The Ohio Supreme Court, in Nestor v. Nestor (1984), 15 Ohio St. 3d 143, 145, has recently set forth the requirements for establishing a common-law marriage as follows:

> "An agreement of marriage in praesenti when made by parties competent to contract, accompanied and followed by cohabitation as husband and wife, they being so treated and reputed in the community and circle in which they move, establishes a valid marriage at common law ***."

The essential element for finding the existence of a common-law marriage is the agreement to marry in praesenti which may be established either by direct evidence or by proof of cohabitation, acts, declarations, and conduct of the parties and their status in the community. The absence of an agreement to marry in praesenti "*** precludes the establishment of such a relationship even though the parties live together and openly engage in cohabitation." Nestor, supra, at 146.

While appellant and Sowers testified that they considered themselves married from the summer of 1981 to the suppression hearing, the trial court afforded this testimony little weight given the nature of the proceeding. After reviewing documents signed by appellant and Sowers during this time period, the trial court found contradictory evidence existed as to whether the parties considered themselves to be married. The court therefore concluded that appellant failed to carry his burden of proving a common-law marriage existed.

Upon reviewing the record, we find the ruling of the trial court was supported by the evidence. Accordingly, this assignment of error is overruled.

VII

In his seventh assignment of error, appellant asserts that the trial court erred when it accepted the jury's recommendation of the death penalty.

After the jury's recommendation of death, the trial court was required to independently review the case and determine whether or not the aggravating circumstances outweighed the mitigating factors and that the death penalty was then warranted. R.C. 2929.03(F). The trial court, in the case sub judice, filed an opinion stating that it had reviewed the evidence and had concluded the aggravating circumstances did, in fact, outweigh any mitigating factors and the death penalty should be imposed.

Appellant argues that, while the trial court correctly summarized the mitigating factors produced by appellant, the court erred when it found that they were outweighed by the aggravating circumstances. We do not agree.

Three aggravating circumstances were present: (1) aggravated burglary, (2) the purposeful killing of two or more persons, and (3) aggravated arson. In contrast appellant presented very little evidence of mitigating factors. There is no evidence that any of the victims induced or facilitated the offense; that it is

unlikely that the offense would have been committed, but for the fact that appellant was under duress, coercion or strong provocation; that appellant had any mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; that at age thirty-one his "youth" was a mitigating factor, or that appellant was not the principal offender. Appellant's evidence went to his lack of a significant history of prior criminal convictions and delinquency adjudications and to those factors described in R.C. 2929.04(B)(7) as "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death."

In this vein the trial court found the following in its opinion: appellant had a nonviolent and "helpful" personality, doing favors for others; appellant was unusually sensitive and attentive to children; appellant had a normal childhood and was attentive and devoted to his father when his father was terminally ill; appellant had married his ex-wife to "rescue" her and that he was kind and considerate to his alleged common-law wife; appellant was relatively young as he had a remaining life expectancy of forty-three years; appellant did not have prior calculation and design to kill the victims but only intended to burglarize the home; and he showed a "high degree of consideration and compassion" by sparing the life of a one-year-old child when the killings had been completed and the house set afire.

This court would be hard-pressed to find in any way that the aggravating circumstances did not outweigh the mitigating factors. Appellant planned the aggravated burglary and, when discovered, killed all who could identify him as the perpetrator and then, to further cover his tracks, set fire to the home. This court has the same lack of sympathy for appellant as that expressed by the trial court.

Appellant's seventh assignment of error is found to have no merit and is overruled.

VIII

In his eighth assignment of error appellant alleges that the trial court erred in overruling his motions concerning various aspects of the death penalty statute. Specifically appellant moved (1) to dismiss the indictment because the statute was unconstitutional, (2) to increase the burden of proof of the state beyond all doubt, (3) to inspect the grand jury transcript, (4) to prohibit the death qualification of jurors and for separate juries for the guilt and penalty phases of trial, (5) for individually sequestered voir dire and for the jury to be sequestered during trial, (6) for the prosecuting attorney to disclose jury selection data, (7) to require the prosecuting attorney to disclose reasons for the exercise of peremptory challenges, (8) to compel the prosecuting attorney to disclose death penalty

data, and to require the prosecution to elect between specifications.

Each of these arguments has been previously discussed and rejected by the Ohio Supreme Court in any one of a number of cases including State v. Jenkins, supra; State v. Maurer, supra; State v. Rogers (1985), 17 Ohio St. 3d 174; State v. Martin (1985), 19 Ohio St. 3d 122; State v. Buell, supra; State v. Williams, supra; State v. Brooks (1986), 25 Ohio St. 3d 144; and State v. Scott, supra.

Specifically, the constitutionality of the Ohio death penalty statute was upheld in all of the above referenced cases. The motion to increase the burden of proof to "beyond all doubt" was discussed and rejected in State v. Jenkins, supra, at paragraph eight of the syllabus, and State v. Williams, supra, at 22. The motion to inspect the grand jury transcript was not well-taken in State v. Rogers, supra, at 184, and State v. Barnes (1986), 25 Ohio St. 3d 203, 210. The motion to prohibit death qualification of jurors was not well-taken in State v. Jenkins, supra, at paragraph two of the syllabus, and State v. Rogers, supra, at paragraph three of the syllabus. The request for separate juries for guilt and penalty phases was not well-taken in State v. Jenkins, supra, at 173-174, fn. 11, and State v. Mapes (1985), 19 Ohio St. 3d 108, 116, cert. denied (1985), ___ U.S. ___, 106 S.Ct. 2905. The motion for individually sequestered voir dire was properly overruled in State v. Mapes, supra,

at paragraph three of the syllabus, and the motion for the jury to be sequestered during trial was properly overruled in State v. Jenkins, supra, at paragraph twelve of the syllabus; State v. Maurer, supra, at 254; Crim. R. 24(G); R.C. 2945.33. The motion to require the prosecuting attorney to disclose jury selection data was properly overruled in that no authority exists to support appellant's position that such must be disclosed, and there was no evidence that the prosecution possessed any special jury selection data not available to defense counsel. The motion to require the prosecuting attorney to disclose the reasons for exercising peremptory challenges was properly overruled absent a showing that the challenges were used to discriminate due to race, see Batson v. Kentucky (1986), 476 U.S. ___, 106 S.Ct. 1712. The motion to compel the prosecuting attorney to disclose death penalty data was properly overruled absent any authority to compel its disclosure. The motion to require the prosecution to elect between specifications was properly overruled, see State v. Hancock (1976), 48 Ohio St. 2d 147, vacated in part on other grounds (1978), 438 U.S. 911.

The trial court properly overruled the pretrial motions.

The eighth assignment of error is overruled.

IX

It now becomes the duty of this court, under the provisions of R.C. 2929.05 to determine whether the sentence of death is

appropriate whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, and to review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances and to determine whether the sentencing court properly weighed the aggravating circumstances and the mitigating factors.

Based upon the evidence adduced at the sentencing hearing, the trial court found that appellant had presented evidence of eight mitigating factors, which the trial court considered:

(1) The appellant was no problem to society prior to the offense and that he had not been convicted or arrested previously.

(2) Appellant did favors for others and that he was helpful.

(3) Appellant was unusually sensitive.

(4) Appellant was good with children.

(5) Appellant was a "good boy" as a child and had a normal childhood.

(6) Appellant was a good husband.

(7) Appellant was relatively youthful.

(8) While he intended to burglarize the home he did not intend to kill anyone.

Against these factors the trial court found that appellant planned the burglary of the Jones' home, an occupied structure where occupants were likely to be present, that appellant killed three people and that he committed aggravated arson which further mutilated the bodies of the three victims.

After careful consideration of the record we are persuaded that the aggravating circumstances appellant was found guilty of committing outweigh the mitigating factors beyond a reasonable doubt.

In determining whether the death penalty is appropriate, R.C. 2929.05 directs this court to consider whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. Our determination therefore requires us to review similar cases decided within the geographical jurisdiction of this court. State v. Rogers, supra, at paragraph nine of the syllabus.

At present, only the case of State v. Davis (May 27, 1986), Butler App. CA84-06-071, unreported, has been decided within the geographical jurisdiction of this court. Having analyzed and compared the facts in State v. Davis with the multiple murders involved in the case sub judice, we cannot say the sentence of death is disproportionate.

We are also guided by recent Ohio Supreme Court cases which have reviewed the appropriateness of imposing the death penalty. State v. Jenkins, supra; State v. Maurer, supra; State v. Martin, supra; State v. Mapes, supra; State v. Buell, supra; State v. Williams, supra; State v. Brooks, supra; State v. Barnes, supra; State v. Scott, supra; State v. Rogers, supra; and State v. Glenn (1986), 28 Ohio St. 3d 451. Our review of these cases leads us to conclude that the sentence of death imposed upon appellant is

appropriate and is neither excessive nor disproportionate to the penalty imposed in similar cases.

Judgment affirmed.

BROGAN and KEEFE, JJ., concur.

Brogan, J., of the Second Appellate District, sitting by assignment.

Keefe, J., retired, of the First Appellate District, was assigned to active duty pursuant to Section 6(C), Article IV, Constitution.

SEP 15 1987

87-1335

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO
'85

STATE OF OHIO, : CASE NO. CR85-04-0182

Plaintiff,

-vs- : OPINION

RHETT GILBERT DEPEW

Defendant.

EDWARD S. RUBEL JR
CLERK

MOSER, J.

Pursuant to O.R.C. 2929.03 (F), the law requires that upon the imposition of the death sentence by this Court that it shall state in writing the existence of any mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

This defendant was indicted on three counts of aggravated murder, one for the death of Theresa Jones, one for the death of Aubrey Jones, and one for the death of Elizabeth Burton.

The defendant was charged with purposely killing these three individuals while he was committing or attempting to commit the offense of aggravated burglary.

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Included in this charge were three specifications as follows:

(1) That the defendant committed aggravated murder while he was committing or attempting to commit the offense of aggravated burglary:

(2) That the defendant committed aggravated murder while committing the offense of aggravated arson;

(3) That the defendant committed aggravated murder and it was part of a course of conduct involving the purposeful killing of two or more persons by the defendant.

On June 19, 1985, the jury returned a verdict of guilty on all three counts in the indictment and to each of the three specifications under each count of the indictment. All counsel consenting, the mitigation phase of the trial began shortly after the jury verdict was rendered. The mitigation phase of the trial was completed on June 20, 1985 and the jury began deliberating, rendering its verdict of the penalty of death on all three counts of the indictment on June 21, 1985.

During the sentencing portion of the trial the defendant offered the following evidence in mitigation:

(1) That this defendant was no problem to society prior to the offense for which he has now stood trial.

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The defendant in his unsworn statement to the jury testified that he had not been arrested or convicted prior to this offense of aggravated murder.

(2) Witnesses, mostly family members, testified that the defendant's personality was one in which he persisted in doing favors for others without expecting any favors in return. In this respect the witnesses testified that the defendant was always helpful and always responded to someone else's need.

(3) Witnesses described the defendant as being unusually sensitive. He was described as having his feelings hurt by people whom he had helped in the past and who showed no appreciation for that help, or would turn their back on him when he asked for any help in return. Witnesses also testified that when the defendant saw people in need he was very prompt to extend help to them.

(4) Witnesses described the defendant as being sensitive to the emotional needs of children and was frequently described as wrestling with his friend's children. He was generally playful and attentive to children. In one instance he even became a "father figure" to a friend's child.

(5) Witnesses, especially the defendant's mother testified the defendant was a "good boy" and that his child-

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hood was quite normal; that he got along with people, and that while there was a period of time in which he was unsure of his father's feelings toward him, he nevertheless was extremely attentive to his father when his father was terminally ill. In this regard the defendant was shown to be very attentive and devote to his father.

(6) Witnesses also testified that while the defendant's marriage ended in divorce, he entered the marriage for what appeared to be the altruistic objective of coming to the rescue of the girl. Mr. DePew had a second alleged wife which he contended was by common law. This alleged common law wife testified that Mr. DePew was kind, considerate thoughtful and protective.

(7) Evidence was also introduced that in spite of defendant's thirty-one years of age he was relatively young in view of the fact that he had a remaining life expect of forty-three years.

(8) The defendant himself made an unsworn statement that while he did intend to burglarize the Jones's residence on November 23rd, 1984, he did not intend to murder anyone. He further stated that he deliberately sought entran into the Jones's home when he believed no one was home. Further that when he was surprised by the presence of three

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occupants, he "freaked out" and went to pieces. The defendant further contended after he had stabbed his victims he did show a high degree of consideration and compassion and mercy to a one year old child found in the house who he wrapped up in blankets and deposited on the next door neighbor's porch.

This Court in deliberating upon its decision in this case, is required by the provisions of O.R.C. 2929.03 (D)(3) to place itself in the position as if it were one of the members of the jury panel. The Court evaluated all of the relevant evidence raised at the original trial, the testimony, other evidence, statement of the defendant Rhett Gilbert DePew, and the arguments of the respective counsel which had been available to the jury in its jury deliberations.

This Court has considered the witnesses offered by the defendant and we very carefully note that most of defendant's witnesses were only able to characterize this defendant to about the year of 1980 or 1981, and many only to the late '70s. Most of these witnesses were related to the defendant by either blood or marriage. We recognize that due to these relationships, the love and devotion to the defendant continues irrespective of his convictions of aggravated murder.

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We heard many sentiments such as sympathy, mercy and compassion, which are not applicable in determining the primary issue of whether the aggravating circumstances outweigh the mitigating factors.

The defendant's plea for mercy cannot enter into the Court's determination of this primary issue.

The strongest mitigating factors on behalf of this defendant were that he had no prior arrest or convictions, and generally occupied an appropriate spot in society. However in the face of the aggravating circumstances present in this case, the mitigating factors pale.

We must consider the fact that this defendant premeditated the aggravated burglary of the Jones's home. This was an occupied structure wherein occupants were likely to be present notwithstanding the fact that Rhett DePew believed the family was not home on this particular evening. Any aggravated burglary has the potential of leading to murder if occupants are unexpectedly found at home by the burglar. The defendant stated in his confession and in his statement before the Court, that he was surprised by the three occupants, and at that time he began swinging his knife in which he stabbed Theresa Jones on multiple occasions; however this was not enough, he continued to stab and swing his knife

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until he had also executed the two children Aubrey Jones and Elizabeth Burton. This multiple slaying was yet another aggravating circumstance.

Then as if the aggravated burglary and the triple slaying were not enough, this defendant committed aggravated arson which further mutilated the bodies of the three victims. The entire episode was heartless.

The mitigating factors offered to counterbalance the aggravating factors were hardly mitigating factors at all, they were simply sympathy generating factors. Except for the fact that this defendant has a history of no arrests or convictions and has been a non-violent individual, the so-called mitigating factors basically call for emotional considerations of sympathy and mercy.

This Court concludes beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.

Respectfully submitted,

John R. Moser, Judge

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Ch. 279-P74

INDICTMENT

Crim. Rule 6, 7

THE STATE OF OHIO

Butler County, ss.

COURT OF COMMON PLEAS

Of the Term January April Special Session **in the year one thousand nine hundred and** eighty-five.

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 23rd *day of* November *19* 84, *at* Butler County, *Ohio,*

RHETT GILBERT DEPEW

* COUNT ONE

did purposely cause the death of Teresa Jones, while the said RHETT GILBERT DEPEW was committing or attempting to commit the offense of AGGRAVATED BURGLARY as defined in Ohio Revised Code Section 2911.11(A)(3), in violation of the Ohio Revised Code, Title AGGRAVATED MURDER, Section 2903.01(B), and against the peace and dignity of the State of Ohio, and with

SPECIFICATION I TO COUNT ONE: The Grand Jurors further find and specify that the offense at bar in Count One hereof was committed by the said RHETT GILBERT DEPEW while he was committing or attempting to commit the offense of AGGRAVATED BURGLARY, as specified in Section 2929.04(A)(7) of the Ohio Revised Code.

SPECIFICATION II TO COUNT ONE: The Grand Jurors further find and specify that the offense at bar in Count One hereof was committed by the said RHETT GILBERT DEPEW while he was committing the offense of AGGRAVATED ARSON as defined in Ohio Revised Code Section 2909.02(A)(2), as specified in Section 2929.04(A)(7) of the Ohio Revised Code.

SPECIFICATION III TO COUNT ONE: The Grand Jurors further find and specify that the offense at bar in Count One hereof was part of a course of conduct involving the purposeful killing of two or more persons by the said RHETT GILBERT DEPEW, as specified in Section 2929.04(A)(5) of the Ohio Revised Code.

COUNT TWO

On or about the 23rd day of November, 1984, at Butler County, Ohio, RHETT GILBERT DEPEW did purposely cause the death of Aubrey Jones, while the said RHETT GILBERT DEPEW was committing or attempting to commit the offense of AGGRAVATED BURGLARY as defined in Ohio Revised Code Section 2911.11(A)(3), in violation of the Ohio Revised Code, Title AGGRAVATED MURDER, Section 2903.01(B), and against the peace and dignity of the State of Ohio, and with

SPECIFICATION I TO COUNT TWO: The Grand Jurors further find and specify that the offense at bar in Count Two hereof was committed by the said RHETT GILBERT DEPEW while he was committing or attempting to commit the offense of AGGRAVATED BURGLARY, as specified in Section 2929.04(A)(7) of the Ohio Revised Code.

(COUNT TWO CONTINUED ON PAGE TWO)

~~in violation of the Ohio Revised Code, Title xxxxxxxxxxxxxx Section~~
~~and against the peace and dignity of the State of Ohio.~~

JOHN F. HOLCOMB *Prosecuting Attorney*

A-73 *Asst. Prosecuting Attorney*

*Set forth the offense in any words sufficient to give the defendant notice of all elements of the offense, or otherwise in

Ch. 279-P74

INDICTMENT

Crim. Rule 6, 7

THE STATE OF OHIO

Butler County, ss.

COURT OF COMMON PLEAS

Of the Term January April Special Session **in the year one thousand nine hundred and** eighty-five

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present ~~that on or about the~~ ~~day of~~ ~~19~~, ~~at~~ ~~Ohio,~~

* (COUNT TWO CONTINUED)

SPECIFICATION II TO COUNT TWO: The Grand Jurors further find and specify that the offense at bar in Count Two hereof was committed by the said RHETT GILBERT DEPEW while he was committing the offense of AGGRAVATED ARSON as defined in Ohio Revised Code Section 2909.02(A)(2), as specified in Section 2929.04(A)(7) of the Ohio Revised Code.

SPECIFICATION III TO COUNT TWO: The Grand Jurors further find and specify that the offense at bar in Count Two hereof was part of a course of conduct involving the purposeful killing of two or more persons by the said RHETT GILBERT DEPEW, as specified in Section 2929.04(A)(5) of the Ohio Revised Code.

COUNT THREE

On or about the 23rd day of November, 1984, at Butler County, Ohio, RHETT GILBERT DEPEW did puposely cause the death of Elizabeth Burton, while the said RHETT GILBERT DEPEW was committing or attempting to commit the offense of AGGRAVATED BURGLARY as defined in Ohio Revised Code Section 2911.11(A)(3), in violation of the Ohio Revised Code, Title AGGRAVATED MURDER, Section 2903.01(B), and against the peace and dignity of the State of Ohio, and with

SPECIFICATION I TO COUNT THREE: The Grand Jurors further find and specify that the offense at bar in Count Three hereof was committed by the said RHETT GILBERT DEPEW while he was committing or attempting to commit the offense of AGGRAVATED BURGLARY, as specified in Section 2929.04(A)(7) of the Ohio Revised Code.

SPECIFICATION II TO COUNT THREE: The Grand Jurors further find and specify that the offense at bar in Count Three hereof was committed by the said RHETT GILBERT DEPEW while he was committing the offense of AGGRAVATED ARSON as defined in Ohio Revised Code Section 2909.02(A)(2), as specified in Section 2929.04(A)(7) of the Ohio Revised Code.

SPECIFICATION III TO COUNT THREE: The Grand Jurors further find and specify that the offense at bar in Count Three hereof was part of a course of conduct involving the purposeful killing of two or more persons by the said RHETT GILBERT DEPEW, as specified in Section 2929.04(A)(5) of the Ohio Revised Code.

~~in violation of the Ohio Revised Code, Title xxxxxxxxxxxxxx Section~~
~~and against the peace and dignity of the State of Ohio.~~

JOHN F. HOLCOMB *Prosecuting Attorney*

A-74 *Asst. Prosecuting Attorney*

*Set forth the offense in any words sufficient to give the defendant notice of all elements of the offense, or otherwise in

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

I § 16 Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

I § 10 Trial for crimes; witness

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury, and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself, but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

§ 9 Bailable offenses; bail, fine and punishment

All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

§ 2929.05 [Appellate review of death sentence.]

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

Any court of appeals that reviews a case in which the sentence of death is imposed shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.

(C) Whenever sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(2) The offender did not present evidence at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications.

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury.

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

(cont.)

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

Q. What do you mean, not really that you can tell me?

A. Well, I've never really seen him with it.

Q. Well, he talked about it, right?

A. Off and on, but I get all kinds of people in that talked about it.

Q. You knew him to carry a knife, right?

A. A small pocket knife.

Q. Did you ever see him carry a large knife in his jacket or anything?

A. No.

Q. You knew he got cut in a knife fight over at King Kwik, didn't you?

A. Yes, I did.

Q. You knew he had trouble with his first wife, right?

MR. GARRETSON: Your Honor, I object to this line of questioning.

MR. SAGE: Goes to his credibility, Your Honor.

MR. GARRETSON: Well, you can ask anything on credibility, if you take it that far.

Judge JOHN R. MOSER
Common Pleas Court
Butler County, Ohio

BY THE COURT: Ladies and gentlemen, at this time we're going to take a fifteen minute recess. Remember the admonition of the Court. Spectators, kindly allow the jurors to exit first.

RECESS.

AND THEREUPON, Court reconvened, and the hearing continued as follows:

BY THE COURT: Alright, Mr. Holcomb.

FINAL ARGUMENT - By Mr. Holcomb:

Thank you, Your Honor. May it please the Court, Mr. Eichel, Mr. Sage, gentlemen for the defendant, ladies and gentlemen of the jury.

I want to clear up just a couple of things before we start here. The first one being the matter of the cooperation of this defendant with the sheriff, like it was some kind of voluntary thing or something. He talked, you know,four months later - four months after this happened, and only after he knew that his girlfriend turned him in. So much for cooperation.

The other thing I wanted to clear up was, this is evidence from the State of Ohio that we've showed you in this penalty phase, or as they like to call it, the mitigation phase, or the sentencing phase. Most of their penalty

Judge JOHN R. MOSER
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evidence, or mitigating factors, seemed like it dealt with matters, you know, beyond the last five years, or beyond the last seven or eight years, so we thought we would show you a few things we thought were relevant - we thought were relevant, you know, to the last five years. There it says self and little brother, first year, (unclear) homegrown ten feet tall. Growing a little grass there you see. But, see he tries to make it sound like you're supposed to weigh this against those other things he calls mitigating factors, and that's not so at all. His Honor will tell you that you weigh that nonsense, that litany of nonsense is what I call it, that he has paraded in here the last day and a half, against all the facts and circumstances, the aggravating circumstances in evidence in the case in chief. Now, that's what we're talking about.

I kind of thought when I came back here this afternoon - I have to tell you the truth - I thought I had made the wrong turn some place and got in the wrong courtroom, because I got in here and all of a sudden, I felt like we were on trial and he was the victim. And I couldn't understand that. And then I started hearing what I'm going to say in my argument, that he told you everything I was going to tell you, and do you know, he was mostly right, because we've had these things against each other before - but we know about him too.

Judge JOHN R. MOSER
Common Pleas Court
Butler County, Ohio

you watch the news, or you listen to the news - you know, you hear about this and that, and you say, what are they doing down at the courthouse. You're talking about some trial. You say, what are they doing - what are those Judges doing down there? Or what are those juries doing down there - what's going on down at that courthouse, what are they doing?

Well, now, that "they" is you. The "they" you talked about is you. And I kind of want to get things into perspective here, like this. With the first living breath that each of us takes, isn't it true that our eventual death is written. The price of life for all of us - the price of life is death. You twelve here today, American citizens tried and true, you're going to set the price for this triple homicide. You can make the price cheap, if you find mitigation or leniency, you can give him a discount. Or you can make the price expensive for this defendant and everybody like him. You can say, yes, it's still true in the United States of America, that a man's home is his castle. His shelter from the world. You can say yes, it's true, and we affirm it that it's a place of refuge for his wife and his children, a place of safety, a place of happiness and contentment, where they don't have to live in fear. Where children can sleep safely in God's peace at night. Where children can help their mother make Christmas cookies, or sister. And snuggle up in a warm bed and lie down to dreams - pleasant dreams.

Judge JOHN R. MOSER
Common Pleas Court
Butler County, Ohio

The defense says, and I knew they would, it doesn't make any difference what kind of penalty that you put on him because any sentence you give him is the death sentence. But that's not true. That's not true. Why, my goodness, Sirhan Sirhan is talking about getting out for killing Bobby Kennedy.

MR. GARRETSON: I object Your Honor, that's not the law in this case.

MR. HOLCOMB: Well, if Your Honor please, he led them to believe that life means life, and it doesn't necessarily mean that, as the Court knows.

BY THE COURT: Then we're going to have to make reference to what it does mean in this case.

MR. HOLCOMB: - Continuing

Now, you're going to have a lot of . . .three options in this case, and you know what the three of them are. But what I'm telling you, when you hear, as the defendant told you, that twenty to life. . .or life with eligibility in twenty means you're going to be there for life - that's not necessarily true.

It's not necessarily true that if you get three counts of twenty to life that it will add up to sixty - that's not necessarily true. And that's the way the law is.

Judge JOHN R. MOSER
Common Pleas Court
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pleads for mercy because he only killed three out of four.

And he did all that he could do, and that was go into his reputation and his character. And I want to talk about that for a minute for good reputation and good character, it might mean something if there was some question or some doubt as to whether a guy committed the act. If there's some question about his identity - if you're trying to decide well, did he do this, or didn't he do it.

But after you know that he did it, then that character and reputation is out the window, it's irrelevant, it's ancient history. I don't know - after twenty-one years in this business, I don't know of a single person who couldn't go out and get somebody somewhere to come in Court and say he had good character and good reputation.

I'm sure - I'm sure - if we could go back in time and have a trial for Adolph Hitler, and Tojo, and Stalin, and Ho Chi Minh - if we could go back in time, couldn't we get their mothers to come to Court with a little book, and tell about what nice children they were?

So the issue isn't whether he ever had good reputation, or good character, or was a nice little boy, the issue is what is the punishment that he gets for the crimes that he committed.

Reputation can only take you so far. Benedict

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Arnold had a great reputation, right before he betrayed his county. Brutus had a great reputation, before he plunged a knife into the chest of his best friend Caesar.

And one of the chosen ones, Judas, had a good reputation right before he did what he did for thirty silver coins.

So, instead of looking at all of that, I always kind of like to look at what's not there. I kind of like to look around and see what hasn't been shown. What you didn't hear. Well, one thing you didn't hear in this case is - you didn't hear any clergymen that's had any dealings with this guy in the last ten years.

You didn't hear anything from any of his teachers. You didn't hear anything from anybody at the YMCA or any social groups, or civil organizations, or things like that where young people usually congregate. You didn't hear anything that I thought was really significant in this penalty stage. He didn't bring in Debbie Sowers, who was his girlfriend. So much his girlfriend, she said she thought she was his common law wife. We found out she wasn't. Well why wouldn't he bring her in and put her on the witness stand and ask her how wonderful he is, and let me cross examine her and ask her some things.

Now, do you remember this morning, this lady

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that came up here and cried the whole time she was on the witness stand, except she didn't have any tears. Her name was Lou Moore. And she said that she and her husband were like very best friends of this defendant. And that they saw him two or three times every week for the last four or five years. That he lived with them from time to time. She said that he was like a brother to her. And I asked her three different times - she said that her husband Larry Moore was DePew's very best friend. No Larry Moore.

It's kind of interesting that his brother Clay's wife didn't appear. And I kind of wonder about things like that because you know, I think, if you're going to let it all hang out, if you're going to have all the family and all the friends, then why not have the best friends. And why not have all the family.

The other thing that I thought in this case, you know, nothing in this case can be fun, and I don't mean for it to be that way. But the gentleman for the defendant, he told you five different times about the oath you took, and about the oath we all take, and the oath I take, and the oath you take - everybody takes the oath except the defendant; he isn't man enough to get up here and take the oath. Everybody in this case took the oath. Everybody in this case raised his right hand to this man, and he says I solemnly

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swear to tell the truth, the whole truth and nothing but the truth so help me God. Everybody except DePew. He wanted to read his, and when he read it he wasn't even man enough to look at you. And when he looked up, he wasn't even man enough to look at you.

He wouldn't sit in that chair because then he would have to answer my questions. And then I would ask him if he's ever been convicted of a criminal offense after the date in question in this case. And I would have. . .

MR. GARRETSON: Your Honor. . .

BY THE COURT: And I will sustain the objection. The jury will disregard that comment.

MR. GARRETSON: May I approach the bench please?

BY THE COURT: Yes.

(Conference at the bench.)

MR. GARRETSON: We are now moving for a mistrial because specifically the Court instructed us that your ruling was the only way that subsequent conviction, subsequent to the date of the offense, could be used is if this man took the stand under oath, for impeachment purposes. It is clearly meant for no other

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Butler County, Ohio

ORIGINAL

Supreme Court, U.S.
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NO. 88-6059

In The

SUPREME COURT OF THE UNITED STATES,

October Term, 1988

RHETT G. DEPEW,

Petitioner,

v.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

I. Whether the alleged misconduct of a prosecuting attorney during the sentencing phase of a capital trial is subject to harmless error analysis under Satterwhite v. Texas, 486 U.S. ____, 100 L.Ed.2d 284, 108 S.Ct. ___ (1988), and Darden v. Wainwright, 477 U.S. 168, 91 L.Ed.2d 144, 106 S.Ct. 24 (1986), where it does not deprive the defendant of a fair trial.

II. Whether it is consistent with the decision in Satterwhite v. Texas, 486 U.S. ____, 100 L.Ed.2d 284, 108 S.Ct. ___ (1988), to apply a harmless error analysis to alleged errors of prosecutorial misconduct occurring during the sentencing phase of a bifurcated capital proceeding.

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RHETT GILBERT DEPEW,

Petitioner,

v.

STATE OF OHIO,

Respondent.

- - - -

Respondent, State of Ohio, prays that a petition for a writ of certiorari herein be denied.

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OPINIONS BELOW

The decision of the Supreme Court of Ohio is reported at 38 Ohio St. 3d 275, 528 N.E.2d 542. The decision of the Court of Appeals, Twelfth Appellate District of Ohio, is unreported and is appended to the Petition at pages A-35 through A-65. The decision of the Court of Common Pleas of Butler County, Ohio, is unreported and is appended to the Petition at pages A-66 through A-72.

JURISDICTIONAL STATEMENT

This appeal is from the decision of the Supreme Court of Ohio wherein the Petitioner's conviction and sentence of death for three counts of aggravated murder with specifications was affirmed. [**State** v. **DePew**, 38 Ohio St. 3d 275, 528 N.E.2d 542 (1988).]

STATEMENT OF THE CASE

Petitioner Rhett G. DePew was indicted in April, 1985 for three counts of aggravated murder, in violation of Ohio Revised Code §2903.01(B), in connection with the deaths of Teresa Jones, Aubrey Jones, and Elizabeth Burton on November 23, 1984. Each aggravated murder count contained three specifications: (1) that the offense was committed while Petitioner was committing aggravated burglary; (2) that the offense was committed while Petitioner was committing aggravated arson; and (3) that the offense was part of a course of conduct involving the Petitioner's purposeful killing of two or more persons, pursuant to Ohio Revised Code §§2929.04(A)(7), (A)(7), and (A)(5), respectively.

On the evening of November 23, 1984, Petitioner DePew went to the residence of Tony and Teresa Jones at 3682 Oxford-Millville Road near Oxford, Ohio, with the purpose of committing an aggravated burglary. Tony Jones and DePew had once been friends, and for three or four months in 1982, Jones let DePew and his girlfriend, Debbie Sowers, rent the basement of the Jones residence. (Record pp. 72-73) Problems had thereafter developed between DePew and Jones, and when DePew would not agree to move out, Jones served a three-day eviction notice on DePew; in response, DePew threatened Jones that he would "get even one day." (R. p. 75)

On that evening, the victims, Teresa Jones, age 27, her sister Elizabeth Burton, age 12, and Teresa's daughters Aubrey, age 7, and Megan, age 1, were at the Jones home baking cookies and celebrating Megan's first birthday; Tony Jones was working the 3-11 shift at the Ford Motor Company plant in Sharonville, Ohio. Teresa was visited by her father, J.C. Burton, who had come over at 5:30 p.m. with Elizabeth and Teresa's brother Shane; after watching television until 10:00 p.m., Mr. Burton and Shane went home and left Elizabeth there to stay the night with Teresa, Aubrey and Megan. (R. pp. 61-63)

DePew's intention that evening was to steal money he believed to be kept in a closet; he told his girlfriend that he intended to replace some property he believed had been damaged by Jones with the money and get even with Tony Jones for the eviction. (R. p. 173) Between 9:30 and 10:00 p.m., Debbie Sowers drove DePew in his mother's car past the Jones residence several times that night until a car in the driveway (Mr. Burton's car) was gone. (R. pp. 176-7) Then DePew told Sowers to drive the car down a small county road behind the Jones house where DePew exited the car, telling her to drive away and return later. (R. p. 178)

As Petitioner later described in his statement to a sheriff's detective, h entered the Jones home through a back door when the house was dark, and as he not expect anyone to be home, he was startled when Teresa Jones found him inside and screamed. (R. p. 217) When he saw all three victims, DePew claimed he "freaked out" and just started swinging his knife. (R. p. 221) After he stabbed the three victims, he set a fire in the master bedroom; hearing the one-year-old baby cry out, he removed the child from her crib and took her outside, leaving her on a porch of an adjacent house before fleeing the scene.

On Debbie Sowers' return twenty minutes later, the Jones house was on fire; Sowers searched the back roads in the area for DePew, whom she found about one mile from the scene. He got into the car and told her that he set a curtain on fire, and that there was no one in the house. (R. pp. 179-181) The next day, after learning of the deaths of Teresa Jones, Aubrey Jones and Elizabeth Burton in the house, Sowers looked in DePew's coat and saw that his knife had spots of blood all over it. (R. p. 183) This knife, a replica of a 1918 U.S. Army trench knife, had a double-edged blade and a brass-knuckle-like, brass-plated grip, was never recovered. (R. p. 184)

At around 11:30 p.m., Tony Jones returned home to find his house ablaze, smoke billowing out of the windows and flames leaping from the house. He broke out windows and attempted to enter to save his wife and children, but there was no safe way to get inside. He went from house to house in the neighborhood, finally getting someone to help, and then called the fire department. He saw his daughter Aubrey and his wife's sister Elizabeth taken away in an ambulance, after firemen located them in the house. (R. p. 71) Aubrey Jones, who was dead on arrival at the hospital, died from twenty-one stab wounds. (R. pp. 143-144) Elizabeth Burton, who was still barely alive at arrival in the emergency room, died shortly thereafter due to hypovolemic shock caused by five stab wounds, fluid loss from the extensive burns to her body, and carbon monoxide contributory to her death. (R. p. 145) Firemen discovered the severely burnt body of Teresa Jones near the doorway of the master bedroom, (R. p. 105); she was determined to have died not from the fire, but from fourteen stab wounds inflicted to the front and back of her body. (R. p. 142) The stab wounds to all three were caused by a double-edged blade of the same type as DePew's Army trench knife. (R. p. 146)

The one-year-old, Megan, was rescued by a policeman who found her lying on the porch of next-door neighbors who were not at home that evening; the child was unharmed, though left to the elements on that very cold night. (R. p. 96)

At the death scene, the Butler County Sheriff's Department detectives photographed the ruins and gleaned evidence that the fire was arson (R. pp. 107-138), but little developed in the way of any investigatory leads until April 3, 1985, when Debbie Sowers, out of fear that DePew might hurt her or kill her, gave her information to Detective Sargeant Rick Sizemore and the prosecuting attorney. At 5:00 p.m. that day, Detective Sizemore and another detective located DePew driving his automobile at the mobile home park in Oxford where Sowers' mother lived; DePew was arrested and taken to Hamilton to the courthouse office of the prosecuting attorney. At 6:00 p.m., Sizemore and DePew went into one of the offices and the detective orally advised DePew of his Miranda rights. DePew then indicated that he understood his rights and would speak with Detective Sizemore. (R. pp. 208-209) Petitioner listened for the most part of several hours as Sizemore related the evidence revealed against him by Debbie Sowers, and eventually Petitioner told the detective about his commission of the killings. At approximately 12:45 a.m., an assistant prosecutor joined the detective and Petitioner in the room with a tape recorder and taped a forty-five minute interview in which DePew confessed to the triple murder in detail. (R. pp. 201-245) This tape-recorded statement was reduced to a twenty-two page typewritten statement, which Petitioner read and signed. (R. pp. 245-246) In this statement, Petitioner confessed to committing the aggravated burglary, murders, and arson; he also disclosed the motives of hatred, theft and revenge which culminated in the mass murder. (R. pp. 239-241)

On June 17, 1985, a jury trial commenced and on June 19, 1985, the jury's verdicts of guilty as to all three aggravated murder counts and all three specifications as to each were made. On June 19-21, 1985, the sentencing phase was conducted and after deliberation the jury made its recommendation of the death sentence on each of the three counts of aggravated murder. On June 25, 1985, the trial court found that the aggravating circumstances found by the jury were sufficient to outweigh the mitigating factors present in the case, and imposed the death penalty, filing a written opinion pursuant to Ohio Revised Code §2929.03(F). (Petition, Appendix pages A-66 to A-72).

REASONS WHY THE WRIT SHOULD BE DENIED

I. Alleged misconduct of a prosecuting attorney during the sentencing phase of a capital trial is subject to harmless error analysis under Satterwhite v. Texas, 486 U.S. ____, 100 L.Ed.2d 284, 108 S.Ct. _____ (1988), and Darden v. Wainwright, 477 U.S. 168, 91 L.Ed.2d 144, 106 S.Ct. 24 (1986), where it does not deprive the defendant of a fair trial.

Petitioner's proposition of law concerns purported instances of prosecutorial misconduct which the courts below held to be harmless error, both the Court of Appeals and Supreme Court of Ohio citing this Court's decision in **Darden v. Wainwright**, 477 U.S. 168 (1986). The circumstances in this case involve: 1) objections to cross-examination and argument by a prosecutor which were sustained and curative instructions were timely given by the trial court; 2) a prosecuting attorney's brief objectionable comment which was thereafter rebuked by timely curative instruction of the the trial court, and completely retracted and discredited by the prosecuting attorney himself; 3) objections to other portions of a prosecutor's argument which were not raised at trial, no assignment of error was made in the intermediate court of appeals relative thereto, and complaint was made in the first instance in the state's highest court; and 4) the state's trial and reviewing courts, upon statutorily-mandated independent review of the death sentence, concluded not only that the alleged prosecutorial misconduct was harmless, but also that the state has proved, by proof beyond a reasonable doubt, that the unusual number of aggravating circumstances of which the accused was found guilty overwhelmingly outweighed the relatively meager evidence of mitigating factors offered by the accused in the sentencing phase. Under the precedents of this Court, the harmless error analysis applicable to claims of prosecutorial misconduct is well established, and the courts below correctly applied this established precedent.

In **Darden** v. **Wainwright**, supra, the Court rejected a similar claim that improper remarks in a prosecutor's summation required the reversal of a conviction and death sentence. The **Darden** standards do not differ substantially from the guidelines established in Ohio case law, as the decision below represents; the question is not whether the remarks of a prosecuting attorney are undesireable or even universally condemned, but rather, the relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." **Darden**, Id. at 181, quoting **Donnelly** v. **DeChristoforo**, 416 U.S. 637, 643 (1974). Relevant to this inquiry are (1) whether the argument manipulates or misstates the evidence or implicates other specific rights of the accused, such as the right to counsel or the right to remain silent; (2) whether the objectionable content is invited by or responsive to the opening summation of the defense; (3) the trial court's instructions that their decision is to be made on the evidence alone, and that arguments of counsel are not evidence; and (4) the existence of overwhelming evidence against the accused, which reduces the likelihood that the jury's decision was influenced by argument. **Darden**, supra, at 181-182.

A review of the decision below will reflect the Ohio Supreme Court's conscientious adherence to the **Darden** standard; and while the court below was critical of certain prosecutorial remarks, it reached the conclusion that the remarks in question here were far less inflammatory than those complained of in **Darden**, and that the comments "did not contaminate the proceedings below to the point that [Petitioner's] right to a fair trial was destroyed" and "did not render the penalty stage of [Petitioner's] trial fundamentally unfair." **State** v. **DePew**, supra, at 288. Using the criteria of **Darden**, the court below found that the numerous complaints, "taken together or even standing alone," were harmless error beyond a reasonable doubt. First, the court found that the introduction of a photograph of Petitioner and his brother,[1] standing next to a marijuana plant, was error "since its probative value was nonexistent and its potential for prejudice was significant," but "given the overwhelming evidence supporting the existence of the nine aggravating circumstances admitted by [Petitioner], balanced against the relatively unremarkable evidence offered in mitigation * * *, it is beyond a reasonable doubt that the jury would have sentenced [Petitioner] to death without having seen this photograph. The factors supporting death as a penalty were so persuasive and so numerous that this single photograph cannot be regarded as having materially prejudiced [Petitioner]. Thus, the error was harmless beyond a reasonable doubt." **DePew**, Id., 38 Ohio St. 3d, at 287.

Secondly, the court below found that a prosecutor's question of a defense character witness as to his knowlegde that Petitioner had "got cut" in a knife fight was at best only an indirect inference of wrongdoing on Petitioner's part, that it did have some relevance to the witness's credibility on testimony as to Petitioner's peaceful character,[2] and that the trial court's curative instruction effectively admonished the jury to disregard the matter in their deliberations, **DePew**, Id., 38 Ohio St. 3d, at 284.

Thirdly, a prosecutor's comment in closing argument to the effect that had the Petitioner taken the stand under oath rather than make an unsworn statement, he would have been subject to cross-examination about any conviction after the date in question, was found to be "not so prejudicial as to require reversal", **DePew**, Id., 38 Ohio St. 3d, at 284, because "the prejudicial effect of the prosecutor's remark was greatly minimized not only by the curative instruction, but also by the prosecutor's apology to the jury, and by his assurance to the

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1. Clay DePew, Petitioner's brother, also testified as a defense character witness in the penalty stage. The photograph was introduced without objection (R. p. 510-511) at the penalty stage by the prosecution, along with literally volumes of snapshots of Petitioner taken throughout his earlier years, introduced by the defense. (R. p. 499)

2. Mike Dingledine, who was Petitioner's cousin and employed him briefly in April, 1985, testified a character witness in the penalty phase that Petitioner was "quiet" and "easy-going" and "if anything came up, it never bothered him," implying a non-violent character. (R. pp. 336-337) Cross-examination attempted to explore this witness's knowledge of this pertinent character trait of the Petitioner, and apparently, the witness knew that Petitioner got cut in a knife fight at a King Kwik and responded affirmatively (R. p. 341):

> **Q.** You knew he got cut in a knife fight over at King Kwik, didn't you?
>
> **A.** Yes, I did.

The prosecutor was acting under the belief that when the defense presented testimony of Petitioner's peaceful character, cross-examination is permitted to test the witness's credibility by inquiry into the basis of the witness's knowledge of Petitioner or the soundness of the character witness's standards of peacefulness. See **Michelson** v. **United States**, 335 U.S. 469 (1948); **State** v. **Elliott**, 25 Ohio St. 2d 249, 267 N.E.2d 806 (1971), vacated on other grounds, 408 U.S. 939 (1972); and Ohio Evidence Rule 405(A).

jury that they should forget his remark 'because there's nothing like that here.' By this statement, the jury was told by the prosecutor himself that no subsequent conviction had occurred." **DePew**, Id., 38 Ohio St. 3d, at 284.[3]

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3. The jury never knew it, but Petitioner had been convicted of an unrelated receiving stolen property offense, subsequent to the date of the murders but prior to the date of his arrest on these charges.

The context of the prosecutor's comment was that Petitioner chose to read an unsworn statement to the jury rather than testify under oath, thereby avoiding any cross-examination, Ohio Revised Code §2929.03(D)(2). In this unsworn statement, which immediately preceded the closing arguments of counsel, Petitioner said, (R. p. 507):

> * * * It may not be important to you, but I've never been arrested or convicted of anything before the night this happened. That's why it's hard on my, it's hard on my family.

Defense counsel's argument immediately preceding the prosecutor's remarks had capitalized on the unsworn statement and manipulated the fact that the trial court's ruling in limine barred the state from presenting a complete criminal history of the defendant who stood in the dock before this jury (R. p. 533):

> (By Mr. Garretson) It's clear, he's from a good family, he has no criminal history prior to that offense -- there's nothing here in evidence -- [the prosecuting attorney] forgot to talk about that -- **there's nothing here to say he has a criminal history. And you can bet if there was it would be here.**

[Emphasis added.] Defense counsel later continued to stress, "there's a lack of any criminal history in this case." (R. p. 562) Mr. Holcomb's closing argument (R. pp. 566-585) discussed the evidence of aggravating circumstances, the relative insignificance of Petitioner's character evidence for mitigating these heinous offenses, and discussed the nature of Petitioner's unsworn statement, as is permitted in Ohio. See **State** v. **Hopes**, 19 Ohio St. 3d 108, 116, 483 N.E.2d 140 (1985); **State** v. **Scott**, 26 Ohio St. 3d 92 at 107-108, 497 N.E.2d 55 (1986). In explaining that the result of the defendant's choice to be unsworn is to bar cross-examination, the prosecuting attorney stated (R. p. 578):

> (By Mr. Holcomb) He wouldn't sit in that chair because then he would have to answer my questions. And then I would ask him if he's ever been convicted of a criminal offense after the date in question in this case. And I would have * * *.

An interrupting objection to the statement was promptly sustained, and a strong curative instruction was given that directed the jury not to draw any inference from the argument, admonishing the prosecutor and jury that "it's improper to make reference to anything that is not in evidence * * *." (R. p. 580) Following that admonition, Mr. Holcomb retracted his previous statement completely (R. pp. 580-581):

> Yes, your Honor, I would sincerely like to apologize for asking that question, and I would tell the jury to disregard it; I shouldn't have said that. I wish you would just forget that because **there's nothing like that here.**

The trial court overruled a motion for mistrial, noting that it gave curative instructions and that the most curative remarks were from the prosecutor himself. (R. p. 587)

Finally, as to the remaining matters now raised by Petitioner, (enumerated in the Petition at pages 5 - 7 as items III, V, VI, VII and VIII), the complete record of proceedings below would establish that none of these matters was raised in or considered as error in the trial court and the court of appeals, and none was raised by Petitioner in the Supreme Court of Ohio.[4] (Only one of them, Item III, was considered sua sponte by the Ohio Supreme Court's majority opinion.) The failure to object to these matters in the courts below constitutes a waiver of the issues, or is at the very least a factor to be considered as sufficient to

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4. None of these issues has been briefed by the State until this writing, because of the failure of the Petitioner to raise the issues on appeal.

Item III concerned comment on the fact that Petitioner's unsworn statement was not under oath, a matter which was obvious to the jury, see **State** v. **Jenkins**, 15 Ohio St. 3d 164, 473 N.E.2d 264, certiorari denied, 472 U.S. 1032 (1985), and these closing remarks added nothing to the impression that had already been created by Petitioner and his counsel by advising the jury that the Petitioner's statement was unsworn, see **Lockett** v. **Ohio**, 438 U.S. 586, 594-595 (1978).

Item V concerns a reply to defense counsel's argument that any life sentence recommended by the jury would mean a death sentence in prison in practical terms; the prosecutor was simply pointing out the fact that the court was not required to impose three life sentences for three deaths consecutively, and that in any event, parole eligibility was a built-in factor of any life sentence. Again, this argument stated the obvious, see **Lockett** v. **Ohio**, Id., and moreover the remark was invited by or responsive to defense summation, see **United States** v. **Robinson**, 485 U.S. ___, 99 L.Ed.2d 23, 108 S.Ct. ___ (1988); **Darden** v. **Wainwright**, supra, at 157; **United States** v. **Young**, 470 U.S. 1, 13 (1985).

Item VI concerns a remark based on inferences drawn from evidence presented by the state at the guilt-phase of the trial, which was the proper subject of comment and deliberation by the jury in the penalty phase, see Ohio Revised Code §2929.03(D)(2). The trial court on motion of the state had granted Petitioner's girlfriend, Debbie Sowers, immunity from prosecution for her part in staging the aggravated burglary of the Jones home by Petitioner, and she had indeed testified that she came forward on April 3, 1985, the afternoon before Petitioner's arrest, only after she feared that Petitioner may have hurt or killed her. (R. p. 194-195) Of course, Petitioner only confessed after his girlfriend had turned him in, and this remark of the prosecutor was factually based.

Item VII concerns a remark on the lack of evidence; the remark of the prosecutor that Petitioner's so-called "common-law wife," (his girlfriend Debbie Sowers), was available but was not called in mitigation by the Petitioner was a comment on the obvious, **Lockett** v. **Ohio**, supra, and did not implicate any constitutional right of the Petitioner, e.g., his right not to testify.

Finally, Item VIII concerns argument classified by Petitioner as a "law and order" appeal. We think that Petitioner paints with too broad a brush, and at the Appendix, hereto, Respondent attaches a photocopy of page 570 of the Record as cited by Petitioner, in its entirety. This Court will see for itself that the prosecutor's argument urged the jury not to take their job lightly, and was an appeal for deterrence of the crime committed by Petitioner, the killing of three innocent victims in their home. The appeal to the jury here to take their responsibility most seriously is the converse of the error committed in **Caldwell** v. **Mississippi**, 474 U.S. 320 (1985), and when discussing considerations relevant to the death penalty, certainly deterrence (and even retribution) may be properly discussed, see **Gregg** v. **Georgia**, 428 U.S. 153 (1976).

negate the prejudice necessary to establish a constitutional violation. See **Estelle** v. **Williams**, 425 U.S. 501 (1976). "Any other approach would rewrite the duties of trial judges and counsel in our legal system." Id., at 512.

It is thus abundantly clear that the Ohio Supreme Court adhered to the principles established in **Darden** v. **Wainwright** in reaching their decision. Further, another recent decision of this Court, **Greer** v. **Miller**, 483 U.S. ____, 97 L.Ed.2d 618, 107 S.Ct. ____ (1987), is consistent with the Ohio Supreme Court's analysis of remarks by the prosecutor which were met by the trial court's stern admonishments and curative instructions to the jury.[5] We have virtually the same type of facts here as in **Greer** v. **Miller**, where a prosecutor's comment in closing argument was met with an immediate objection and curative instructions, plus in the present case we have an apology by the prosecutor disclaiming any inference that could have been drawn from the comment.

Petitioner unconvincingly attempts to distinguish the Court's decision in **Darden** v. **Wainwright** as being applicable only to claims of guilt-phase prosecutorial misconduct. While Petitioner correctly notes that the **Darden** case analyzed the improper prosecutorial comments in the context of the guilt-stage of a bifurcated capital trial, and a footnote of the Court stated that this context "greatly reduc[ed] the chance that they had any effect at all on sentencing," Id. at 183, n. 15, it was clear that **Darden** was a death penalty case, the argument of the prosecutor was not limited to the issue of guilt but was an exhortation to the jury to render the death penalty, and there was nothing said by the Court in **Darden** to demonstrate a clear inapplicability of its analysis to penalty-stage prosecutorial comments. As noted by a dissenting member of the Court, there was

5. In **Greer** v. **Miller**, the prosecutor's question of a defendant regarding his postarrest, post-Miranda silence was promptly cut off by a defense objection and a trial court's admonition that the jury was to disregard the question and refrain from drawing any inference from it. The Court held that there was no violation of the rule of **Doyle** v. **Ohio** (1976), 426 U.S. 610, in that the trial court did not permit use of postarrest silence as impeachment; the Court further held that the prosecutor's attempt to violate the **Doyle** rule by asking an improper question in the presence of the jury was not prosecutorial misconduct which "so infected the trial with unfairness as to make the resulting conviction a denial of due process," **Donnelly** v. **DeChristoforo**, supra, 416 U.S., at 643. Viewing the remark in context, citing **Darden** v. **Wainwright**, supra, and **Donnelly**, supra, the Court found that the sequence of events -- a single question, followed by an immediate objection and two curative instructions -- clearly indicated that the prosecutor's conduct did not violate the defendant's due process rights. **Greer** v. **Miller**, supra, 97 L.Ed.2d at 630-631.

little practical difference between such error in the guilt phase in **Darden** and similar error in the penalty phase, as the penalty phase in Darden's case was limited to a very brief hearing which immediately followed the offending remarks and the jury's guilt verdict. **Darden**, Id. at 196 n.3 (Blackmun, J., dissenting).

Moreover, a subsequent decision by the Court last term indicates that a constitutional error in the penalty stage of a capital trial is properly subject to harmless error analysis. **Satterwhite** v. **Texas**, 486 U.S. ____, 100 L.Ed.2d 284, 108 S.Ct. ____ (1988). In that case, while finding it impossible to find harmless the admission of psychiatric testimony on the issue of the accused's future dangerousness, a critical issue under Texas law in the sentencing jury's decision to impose a death sentence, the Court held that the harmless error rule set forth in **Chapman** v. **California**, 386 U.S. 18 (1967), would apply to a constitutional violation at the sentencing phase of a capital trial, [the violation in **Satterwhite** being the admission of psychiatric testimony in violation of the Sixth Amendment right set out in **Estelle** v. **Smith**, 451 U.S. 454 (1981)]. In so holding, the Court stated, "we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." **Satterwhite** v. **Texas**, supra, 486 U.S., at ___ , 100 L.Ed.2d, at 295. By the same token, assuming that prosecutorial misconduct would constitute a due process violation (under the Fifth and Fourteenth Amendments) equal to a Sixth Amendment violation of **Estelle**, the harmless error analysis of **Chapman** would also be applicable to this constitutional claim at the sentencing stage of proceedings. See Argument II, infra.

II. Consistent with the decision in Satterwhite v. Texas, 486 U.S. ___, 100 L.Ed.2d 284, 108 S.Ct. ___ (1988), harmless error analysis is applicable to alleged errors of prosecutorial misconduct occurring during the sentencing phase of a capital proceeding.

As to the second question presented, it is clear from the decision below that the Ohio Supreme Court's harmless error analysis of the alleged prosecutorial misconduct was consistent with this Court's decision in **Satterwhite** v. **Texas**, 486 U.S. _____, 100 L.Ed.2d 284, 108 S.Ct. _____ (1988). It is Respondent's position that where the reviewing court finds that the evidence supporting the sentence of death was "overhelming" and that the remarks in question did not render the penalty phase of the trial fundamentally unfair, in accordance with **Darden** v. **Wainwright**, supra, the reviewing court has complied with the harmless error analysis error required by **Satterwhite** v. **Texas**.

In this case, the Ohio Supreme Court found, first, that the erroneous use of a prejudicial photograph was error, but stated,

> "given the overwhelming evidence supporting the existence of the nine aggravating circumstances admitted by [Petitioner], balanced against the relatively unremarkable evidence offered in mitigation * * *, it is beyond a reasonable doubt that the jury would have sentenced [Petitioner] to death without having seen this photograph. The factors supporting death as a penalty were so persuasive and so numerous that this single photograph cannot be regarded as having materially prejudiced [Petitioner]. Thus, the error was harmless **beyond a reasonable doubt.**" **DePew**, Id., 38 Ohio St. 3d, at 287, [emphasis added].

On that point, therefore, the court below expressly applied the "beyond a reasonable doubt" standard to the error in question. Secondly, the court below determined, with reference to the other remarks of the prosecutor:

> "The comments in the instant cause did not contaminate the proceedings to the point that [Petitioner's] right to fair trial was destroyed. The evidence supporting the sentence of death was indeed overwhelming. The remarks in question did not render the penalty stage of [Petitioner's] trial fundamentally unfair." **DePew**, Id., 38 Ohio St. 3d, at 288.

Moreover, with repect to the evidence was in support of the death sentence, the court below found, **"beyond a reasonable doubt**, that the unusual number of aggravating circumstances in this case is not outweighed by the relatively meager mitigating factors offered by [Petitioner]." **DePew**, Id., 38 Ohio St. 3d, at 292, [emphasis added]. Thus, by implication, the court below was applying the "beyond a reasonable doubt" standard to the error in question.

In **Satterwhite**, the Court held that the harmless error rule set forth in **Chapman** v. **California**, 386 U.S. 18 (1967), applies to a constitutional violation [the admission of psychiatric testimony in violation of the Sixth Amendment right set out in **Estelle** v. **Smith**, 451 U.S. 454 (1981)] at the sentencing phase of a capital trial. In so holding, the Court stated, "we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." **Satterwhite** v. **Texas**, supra, 486 U.S. at ____, 100 L.Ed.2d, at 295. Noting that the Texas court's decision simply found that the evidence was "sufficient," absent the offending psychiatric testimony, for the jury to find in favor of the State's case on the material issue of future dangerousness, this Court reversed, holding that harmless error analysis does not concern the sufficiency of the legally admitted evidence to support the death sentence, but rather "whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' **Chapman**, 386 U.S., at 24." **Satterwhite**, supra, at ____, 100 L.Ed.2d, at 295, (emphasis added). The Court in **Satterwhite** concluded that the improperly admitted psychiatric testimony was "powerful and unequivocal," that the prosecution had placed "great weight" on it in the penalty phase closing arguments, and that the offending expert testimony directly went to a "critical" finding of the accused's future dangerousness; thus, the Court found it impossible to say beyond a reasonable doubt that the expert testimony on the issue did not influence the sentencing jury. Id. at ____, 100 L.Ed.2d, at 296. Thus, it was a significant factor in **Satterwhite** that in Texas, the jury in the sentencing verdict must answer the very question that the improperly admitted psychiatric testimony purported to answer. However, that is not true in the case at bar; first of all, the trial court sustained defense objections to the prosecutor's comments in the case at bar, and gave curative instructions to the jury. See **Greer** v. **Miller**, supra. Secondly, while in **Satterwhite** the objectionable material was evidence to be considered by the jury which directly bore on the issue to be decided under Texas law, that was not the case here; unlike **Satterwhite**, the jury was given the usual instruction that the arguments of counsel are not evidence, and the alleged error of prosecutorial misconduct did not go to the very heart of the question that the jury must answer in rendering the sentencing recommendation.

Thirdly, the comments were not as in the case of **Caldwell** v. **Mississippi**, 472 U.S. 320 (1985), wherein the offending remarks alluding to further appellate review of the death sentence were an attempt to diminish the jury's appropriate sense of responsibility in their decision on the penalty. Rather, a review of the prosecutor's comments in their entirety (and not simply excerpts presented in the Petition) together with the trial court's instructions would establish, under the totality of the circumstances, that the jury was appropriately guided as to the nature of its task, without diminishment of their responsibility; indeed, the prosecutor's summation urged the jury to consider its task with the utmost responsibility.

Further, if there remains any doubt whatsoever that the Ohio Supreme Court applies the correct standard of review in harmless error case, that doubt was put to rest in a case decided two weeks after **DePew**, in **State** v. **Williams**, 38 Ohio St. 3d 346, 528 N.E.2d 910. Justice Douglas, the author of the opinion herein, specially concurred in **Williams** to discuss the point that the Ohio Supreme Court has consistently applied the harmless error standard set forth in **Chapman**, supra, and in **United States** v. **Hasting**, 461 U.S. 499 (1983) and **Delaware** v. **Van Arsdall**, 475 U.S. 673 (1986). See also **State** v. **Zimmerman**, 18 Ohio St. 3d 43, 479 N.E.2d 862 (1985).

In conclusion, unlike the Texas courts in **Satterwhite**, the Ohio Supreme Court below found the evidence in the case at bar compelling the death sentence was not only sufficient, but **overwhelming**. Consistent with the decision in **Satterwhite**, supra, the Court below held that the harmless error rule set forth in **Chapman**, supra, applies to a constitutional violation [prosecutorial misconduct in violation of the Fourteenth Amendment due process rights set out in **Darden** v. **Wainwright**, supra], at the sentencing phase of a capital trial. Contrary to the Petitioner's claim, and unlike the Texas court in **Satterwhite**, the decision of the court below clearly did not apply a mere "sufficiency of the evidence" test to determine that the due process claim of the Petitioner, based on instances of prosecutorial misconduct, was harmless.

CONCLUSION

Because the decision of the court below is consistent with the applicable decisions of this Court, because it is not shown in the petition for certiorari that there is a conflict between the decision in this case and any decision of another state court, and because the claims made herein are not substantial, see **Maggio** v. **Williams**, 464 U.S. 46 (1983), this Court should decline to review the instant case.

Petitioner DePew's application for certiorari should be denied.

Respectfully submitted,

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you watch the news, or you listen to the news - you know, you hear about this and that, and you say, what are they doing down at the courthouse. You're talking about some trial. You say, what are they doing - what are those Judges doing down there? Or what are those juries doing down there - what's going on down at that courthouse, what are they doing?

Well, now, that "they" is you. The "they" you talked about is you. And I kind of want to get things into perspective here, like this. With the first living breath that each of us takes, isn't it true that our eventual death is written. The price of life for all of us - the price of life is death. You twelve here today, American citizens tried and true, you're going to set the price for this triple homicide. You can make the price cheap, if you find mitigation or leniency, you can give him a discount. Or you can make the price expensive for this defendant and everybody like him. You can say, yes, it's still true in the United States of America, that a man's home is his castle. His shelter from the world. You can say yes, it's true, and we affirm it that it's a place of refuge for his wife and his children, a place of safety, a place of happiness and contentment, where they don't have to live in fear. Where children can sleep safely in God's peace at night. Where children can help their mother make Christmas cookies, or sister. And snuggle up in a warm bed and lie down to dreams - pleasant dreams.

Judge JOHN R. MOSER
Common Pleas Court
Butler County, Ohio

SUPREME COURT OF THE UNITED STATES

RHETT G. DEPEW *v.* OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 88–6089. Decided February 21, 1989

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not hold these views, I would still grant the petition for certiorari. By any reasonable measure, the prosecutor's comments to the jury "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden* v. *Wainwright*, 477 U. S. 168, 181 (1986), quoting *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974).

Petitioner was convicted of aggravated murder and sentenced to death. The Ohio Supreme Court identified four instances of prosecutorial misconduct, but concluded that, because of the brutal nature of the crime, they neither singly nor cumulatively deprived petitioner of a fair trial.

The first was the prosecution's inquiry, during cross-examination of a defense witness, into a "knife fight" during which petitioner had allegedly been cut. The knife fight was wholly unrelated to the alleged murder, and the judge accordingly admonished the jury to disregard the prosecutor's reference to it. *State* v. *Depew*, 38 Ohio St. 3d 275, 284 (1988).

The second was the prosecutor's comment during closing argument that, if the petitioner had taken the stand, the prosecutor would have inquired into the petitioner's criminal convictions *after* the date of the alleged murder. The judge again ordered that the jury disregard the prosecutor's comment, and the prosecutor apologized to the jury, saying: "I just shouldn't have said that. I wish you would just forget that because there's nothing like that here." *Ibid.*

The third was the prosecutor's introduction into evidence, during the penalty phase, of the petitioner standing next to a marijuana plant. The prosecutor adverted to this photograph during the penalty phase. The state supreme court found the introduction of this photograph to be error, but concluded: "The factors supporting death as a penalty were so persuasive and so numerous that this single photograph cannot be regarded as having materially prejudiced [petitioner]." *Id.*, at 287.

Fourth and finally, the prosecutor made various improper closing-argument comments, "by reminding the jury that any sentence less than death could result in eventual parole, by alluding to facts not in evidence, by asking the jury why [petitioner] did not call certain persons to the stand, and by appealing to the jury's desire for law and order." *Ibid.* The state supreme court again found these comments only harmless error.

In my view, it is beyond serious dispute that these prosecutorial actions cumulatively deprived the petitioner of a fair trial. The dissenting state supreme court judge characterized these actions, quite properly in my view, as "prosecutorial misconduct of the worst sort." *Id.*, at 293 (Wright, J., concurring in part and dissenting in part). Even the majority, so tolerant of these abuses, found it necessary to state: "While the prosecutorial misconduct in this case does not require a reversal of appellant's sentence, we express our mounting alarm over the increasing incidence of misconduct by both prosecutors and defense counsel in capital cases."

Id., at 288. I would accordingly grant certiorari here, to clarify that behavior such as that outlined above is simply not constitutionally acceptable, and to correct the errors in this case which may have been responsible for putting petitioner on death row.